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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1450

IN THE MATTER OF RALPH E. COREY, *Petitioner*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Hawaii entered in this case on November 28, 1973.

OPINION BELOW

The opinion of the Supreme Court of the State of Hawaii, 55 Haw. ——, is reproduced as Appendix A to this petition.

JURISDICTION

The judgment of the Supreme Court of the State of Hawaii was entered on November 28, 1973 (Appendix B), following the filing of the Court's opinion on October 19 and the denial of a timely petition for rehearing on November 5 (Appendix C). Time to file

this petition was extended by Mr. Justice Douglas to March 28, 1974.[1] Jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

This case raises important questions concerning the procedural safeguards imposed by the Confrontation and Due Process Clauses in disciplinary proceedings in which attorneys may be deprived of their right to

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[1] In granting the extension, applied for on February 15, 1974, more than 10 days prior to the expiration of 90 days from entry of judgment on November 28, the Justice did so "without prejudice to the Court's consideration of whether this application was timely filed."

The application was timely. First, because this case was initiated as an original proceeding in the Hawaii Supreme Court, the judgment entered on November 28 was the first and only judgment ever entered in this matter, and the only "final judgment or decree" from which review could be sought. As such, the situation here is in no sense comparable to cases in which the highest court of a state, following review of a lower court judgment, issues a mandate or remittitur directing the lower court to enter a new judgment in accord with the reviewing court's opinion.

Second, it is the practice in Hawaii to embody the Supreme Court's judgment in a formal document submitted by counsel, approved by a member of the Court, and entered by the Clerk. It is this judgment that was entered on November 28, 1973. The Court's mandate issues at a later date. Rule 10, Sup. Ct. of Hawaii. (Included in Appendix D hereto) Hawaii does not follow the practice of some other jurisdictions wherein judgment is deemed to have been entered immediately upon the denial of rehearing, with "effectiveness" or the issuance of a remittitur or mandate postponed for a period of time. This Court has observed this distinction in passing upon the timeliness of applications for review. Compare *Puget Sound Co.* v. *King County*, 264 U.S. 22 (1924) (measuring time from formal entry of judgment where "however final the decision may be, it is not the judgment.") with *Market Street R. Co. v. Railroad Comm'n.*, 324 U.S. 548 (1945) (ignoring deferred effective date).

practice their profession and forced to suffer the consequences of suspension or disbarment. Accepting the view of the Attorney General that these safeguards did not apply, and ignoring *In re Ruffalo,* 390 U.S. 544 (1968), *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96 (1963), and *California* v. *Green,* 399 U.S. 149 (1970), the Supreme Court of Hawaii violated petitioner's rights. Review by this Court is particularly urgent here, for petitioner was suspended in original proceedings before the Hawaii Supreme Court, which acted as his initial accuser and his final and only judge. Accordingly, petitioner has never had the benefit of any appellate review of the constitutional questions pertaining to the proceedings before the tribunal which disciplined him. The questions raised are these:

1. Were petitioner's constitutional rights violated when he was suspended from the practice of law by the Supreme Court of Hawaii which, acting as a disciplinary tribunal of original jurisdiction, announced that his conduct would be measured by one standard, then suspended him for alleged violations of different standards?

2. Were petitioner's constitutional rights violated when he was suspended from the practice of law by the Supreme Court of Hawaii which acted on the basis of testimony in a prior civil litigation without affording petitioner any opportunity to confront his accusers and cross-examine them before the tribunal that was to adjudicate his conduct?

3. Were petitioner's constitutional rights to an impartial adjudication violated when he was suspended from the practice of law by the Hawaii Supreme Court where that Court had already publicly accused peti-

tioner of misconduct as an attorney during the course of a civil litigation in which that issue was not involved, and particularly in view of the circumstances that:

(a) The Court's pronouncement in the civil litigation was preceded by a surreptitious campaign by petitioner's adversaries of ex parte communications with the Court;

(b) The Court, contrary to its own long-established practice, conducted petitioner's disciplinary proceeding as an original proceeding, thus bypassing the customary factual hearing before a lower tribunal;

(c) The Court then proceeded to adjudicate solely on the basis of the record of the prior civil litigation and without affording petitioner any opportunity to confront his accusers or to know the standard by which his conduct would be measured.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in pertinent part that:

> "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him. . . ."

The Due Process Clause of the Fourteenth Amendment provides in pertinent part that no state shall:

> "deprive any person of life, liberty, or property, without due process of law . . . ."

STATUTES AND RULES INVOLVED

This case also involves Rules 5, 10 and 16 of the Supreme Court of Hawaii Rules; Canon 9 of the Code

of Professional Responsibility, American Bar Association (1970); and Canons 15, 16, 29 and 32 of the Canons of Professional Ethics, American Bar Association (1908) as made applicable in the State of Hawaii by Rule 16(a) of the Supreme Court of Hawaii Rules. The foregoing Rules and Canons are included in Appendix D hereto. The Order of the Supreme Court of Hawaii amending Rule 16, effective July 1, 1974, is included herewith as Appendix E.

INTRODUCTORY STATEMENT

Petitioner Ralph E. Corey, 55, has lived in Hawaii for over 25 years. Since his graduation from the Harvard Law School in 1954, he has been an active member of the Hawaii bar and twice a primary candidate for the state legislature.

On November 28, 1973, Corey was ordered suspended from the practice of law for a period of six months. This suspension, stayed pending review here, requires Corey to notify all clients of his suspension, and for all practical purposes destroys the practice he built up over 20 years.

The suspension arose from alleged conduct occurring nearly ten years earlier not in the practice of law, but in a corporate real estate venture in which he was a participant. That venture led to civil litigation, an adverse jury verdict against Corey and two business associates, grant of a new trial on the damages issue by the trial judge, and reinstatement of the jury verdict in the Supreme Court of Hawaii. At the same time, the Supreme Court—after a surreptitious campaign of ex parte vilification addressed to members of the Court by Corey's trial court adversaries—included in its opinion

its view that Corey's conduct in his business venture amounted to professional misconduct.

Thereafter, following proceedings against Corey based entirely on the record in that civil litigation, and after additional ex parte communications from Corey's adversaries, the Supreme Court ordered Corey suspended from practice. In doing so, the Court intentionally bypassed its own long established procedures whereby inquiries into professional misconduct are referred to commissioners for hearing.[2] Instead, it invoked a procedure—an original proceeding in the Supreme Court itself—not utilized previously against any attorney. Assuming that continued bar membership is a privilege not protected by procedural due

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[2] The Hawaii Supreme Court has described its *usual* disciplinary procedure as follows:

> "Rule 16 provides for reference to and a hearing by the commissioners appointed thereunder on charges of unprofessional conduct by attorneys of the bar. It contemplates and provides for a full hearing before the commissioners who, at the conclusion thereof, are required to submit a report to the court. If the commissioners find the attorney guilty of unprofessional conduct, he has a right to contest the finding by filing exceptions to the report in this court. The review by this court is on the record alone. There is no trial de novo, as was expressly provided for in our rule governing disciplinary proceedings before the adoption, in 1955, of the present rule 16. (See old rule 19 set out in 39 Haw. at p. 707) . . .
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> • • •
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> "The procedure prescribed by Rule 16 is very practical. Proceedings under the new rule are much more convenient to court and to all parties concerned in a disciplinary hearing than the formerly existing practice of trying disciplinary proceedings anew in this court. The accused attorney's rights are adequately protected. He has full opportunity to be heard and to make his record before the commissioners. Under the new rule he is given ample opportunity in this court to challenge the charge and the findings of the commissioners on that record." *In re Trask*, 46 Haw. 404, at 414-416 (1963).

process, the Court, on the same record which led to its earlier public reprimand of Corey in the civil litigation, found him guilty of conduct warranting suspension. In the process, the Court denied him the right to confront his accusers, to adequate notice of the precise charges against him, and to an impartial tribunal.

STATEMENT OF THE CASE

A. The Business Venture that Led to the Suspension

In 1964, petitioner Corey became a shareholder, vice president, and general counsel of the Kauaian Development Company, Inc. ("Kauaian Development"). The company owned a section of ocean front property upon which it desired to build a hotel-condominium complex. State Savings and Loan Association ("State Savings") agreed to lend construction funds equal to 65 percent of the cost of construction of the complex plus the appraised value of the undeveloped land, or 65 percent of the appraised value of the property as completely developed, whichever was less.

Among the supporting documentation requested and obtained by State Savings were an independent appraisal that estimated the value of the completed project at $1,345,000, and a construction contract that reflected either a total construction price of over $750,000, or, alternatively, cost plus 7 percent. On January 17, 1964, State Savings granted Kauaian Development a loan for $857,000. Corey and Kauaian Development president Kimbrough agreed in writing to be personally liable for construction costs above those provided by the loan proceeds. When State Savings refused to grant the necessary condominium status to the completed project, Kauaian Development defaulted.

B. The Civil Litigation Whose Record Was Relied Upon To Discipline Petitioner

In 1966, State Savings instituted a mortgage foreclosure suit for $1,050,000—representing the unpaid balance of the loan, several mechanics liens, and the costs of foreclosure. State Savings itself bought in the property at court-ordered auction in 1966 for $931,000, creating an alleged "deficiency" of $138,000 after application of the proceeds to its loan. It then resold it nine months later for $1,350,000,[3] making a quick profit on the entire transaction of over $300,000.

But before reselling the complex in June 1967, State Savings sued Corey, Kimbrough and Kauaian Development's secretary-treasurer Young for the alleged deficiency of $138,200—essentially the difference between the auction sale price and the "damages" that had been claimed in the foreclosure suit.[4]

The deficiency suit charged Corey, Kimbrough and Young with fraud in connection with the presentation of the allegedly misleading construction contract. Plaintiff alleged that it had relied on the purported contract for over $750,000 in calculating what it should lend Kauaian Development, but that the actual contract was for only $600,000 plus three condominium

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[3] This sale fully confirmed the accuracy of the independent appraisal submitted by Corey and his associates which had estimated the value of the completed project at $1,345,000. State Savings has never contested the accuracy of the estimate. See Record 282-283; a copy of the certified Record has been filed with the Clerk of this Court.

[4] These "damages" of $138,000 which the Supreme Court of Hawaii ultimately awarded State Savings in 1971, had become a $300,000 profit on the resale four years earlier.

units valued at $60,000. It asserted that the larger contract was fraudulent and had been submitted for the purpose of inducing it to make a larger loan. Defendants denied that the larger contract was fraudulent, that plaintiff was unaware of the second, lower contract, or that plaintiff had in any way relied on the value of the larger contract in making its loan decision.

The case was tried to a jury in 1969, six years after the events in question, two years after State Savings had resold the property at a substantial profit, and without any suggestion that at stake were not only money damages but defendant Corey's right to practice law. At trial, one or another of the three defendants sharply disputed plaintiff's reading of the documents and challenged the testimony of the key relevant witness, State Savings' Ralph Brown, who admitted that his recollection was hazy. (Record 174, 203, 308)

Corey testified that he had not personally prepared any of the financing papers. He conceded that he knew the contractor had subsequently agreed with Kimbrough to enter into a less expensive contract, but he insisted that plaintiff had looked to the appraisal and not to the contract in calculating its loan, and that in the circumstances, he did not believe he owed a duty to State Savings to inform it of the contract re-negotiation. (Record 465-69)

What Corey's role was, what State Savings knew, and what it relied upon were all sharply disputed factual issues. The jury, which was not permitted to learn of State Savings' profitable resale of the property in 1967, found for plaintiff against Corey and Kimbrough on the fraud count. The trial judge, however, ordered

a new trial on the issue of damages under the fraud count.[5]

On appeal, the Supreme Court of Hawaii reinstated the jury's verdict and damage assessment.[6] In doing so, it went far beyond the issues raised to reprimand Corey for his conduct as it read in the record. The Court asserted that

> "Defendants herein misrepresented to a prospective mortgagee the true nature of the contract between developer and contractor upon which the mortgagee relied in determining the amount of the loan. . . . We feel it pertinent to specifically admonish the perpetrators of such conduct. . . .
>
> "In particular, this court questions the status of defendant Corey in this case. Young testified that he relied upon Corey as his attorney during the negotiation for the mortgage. We do not presume to characterize the relationship between Corey and Young in this transaction as attorney-client. And yet an attorney, as an officer of the court, owes a special duty to the public, his client and the bar to keep his conduct beyond reproach, whether it be in or outside the scope of his status as an attorney. A lawyer should avoid even the appearance of professional impropriety. *Code of Professional Responsibility, Canon 9.* The conduct of attorney Corey in this case raises serious questions of impropriety."

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[5] Although the trial judge did not explain his ruling, the defendants had argued that the record did not support, and indeed contradicted, the contention that the alleged misrepresentation proximately caused damage to plaintiff, or that plaintiff had indeed suffered any damage. The Supreme Court assumed that he concluded it was error to exclude evidence of the profitable resale.

[6] *Corey* v. *State Savings & Loan Ass'n.*, 53 Haw. 132, 488 P.2d 703 (1971), *cert. denied*, 406 U.S. 920 (1972).

C. The Ex Parte Campaign Against Petitioner

This judicial pronouncement was preceded by a most extraordinary surreptitious campaign of ex parte communications addressed to the Supreme Court by State Savings' trial counsel, James Campbell, and by its chief trial witness, Ralph Brown, who urged the Court to discipline Corey notwithstanding the pendency of litigation that was likely to, and did, come before the Court.

As the record now discloses, shortly after State Savings commenced its foreclosure suit against Kauaian Development, Campbell filed a complaint with the Hawaii Real Estate Commission. Two days later, he wrote the Bar Association Ethics Committee. Follow-up letters were written. (Record 94-95) Unsuccessful in this effort, Campbell went directly to the Chief Justice of the Hawaii Supreme Court. In a letter dated June 3, 1966 (just five days before the filing of an appeal in the Hawaii Supreme Court from the mortgage foreclosure suit), and under the guise of asking the Court to disqualify petitioner's counsel, Campbell repeated the allegations previously submitted to the Ethics Committee and the Real Estate Commission. (Record 96-98). Neither the Court nor Campbell informed Corey of this communication. Nor was Corey informed that communication with the Court continued even after the mortgage foreclosure appeal was lodged. As briefs were being submitted, Brown was writing to the Court to buttress Campbell's complaint. (Record 100-101) All this took place before Corey took the witness stand in the deficiency suit, on October 2, 1969.

On October 11, 1969, two days after the jury's verdict in the second litigation, Campbell wrote the Chief Jus-

tice to inform him of the result, enclosing a copy of the proposed complaint amended to conform to the proof. He urged the Court, on its own motion, to suspend Corey pending appeal from the jury's verdict. (Record 104-106) Brown wrote the Chief Justice nine days later to inform him that the mortgage foreclosure had resulted in a "loss" to State Savings of $138,000, without disclosing the profit on resale. (Record 106)

On October 22, 1969, three years after Campbell's first communication with the Court, Corey was for the first time notified by the Chairman of the Bar's Committee on Inquiry that charges had been lodged against him and that an investigation was underway. The existence of one letter to the Chief Justice was disclosed at the time. (Record 106)

D. The Disciplinary Proceedings

On August 29, 1972, nearly one year after the Court's opinion in the *State Savings* appeal and nine years after the events in question, the Supreme Court of Hawaii issued to Corey an order to show cause, which stated in its entirety:

> "You are hereby cited and ordered to file on or before October 2, 1972 a written statement showing cause, if any you have, why you should not be censured, suspended, or disbarred from all the courts of the State of Hawaii on the basis of the record in *State Savings & Loan Association* v. *Corey and Kimbrough,* No. 5021.
>
> "A copy of this order shall be served on the Attorney General of the State of Hawaii who is hereby requested, personally or through a deputy, to appear in these proceedings as amicus curiae." (Record 2)

This was all the notice Corey was ever to get from the Supreme Court.

Corey specially appeared to request the recusal of justices who had participated in the *State Savings* appeal and who had already publicly censured him. (Record 7-8) This was denied.[7]

Corey moved to dimiss the show-cause order for failure to provide adequate notice of the charges or, alternatively, for a bill of particulars; and requested a hearing before a fact-finding commission as provided for under the Court's Rule 16(c). (Record 50-51) These requests were also denied.

Finally, Corey sought to bar introduction of the *State Savings* record, claiming that its use would deny him his federal constitutional right to confront his accusers in the forum in which his punishment would be determined. (Record 57) This too was denied.

As to the merits, petitioner denied violating Canon 9, the only legal standard ever cited to him. He asserted that State Savings had not been defrauded, for its sole interest and reliance was on the independent appraisal, the later renegotiation of the construction contract was not material to the loan calculations, and in these circumstances he had no duty to inform State Savings of the change. (Record 46-48)

The Court overruled Corey's procedural objections and directed the Attorney General to file specifications of portions of the record in *State Savings* supporting disciplinary action. Corey was ordered to respond with a counter specification and to submit a written offer of

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[7] Justice Marumoto did recuse himself for unrelated reasons.

proof. Corey responded with a counter specification disputing the sufficiency of the Attorney General's specifications. And he adhered to the position that the Court could not rely on the prior record; that he was entitled, under the Constitution, to examine live witnesses before his judges; and that he should not be confined to submission of a paper case. (Record 158-514)

The Court set "argument" on the specifications and counter-specifications—30 minutes per side. (Record 517) When he formally inquired about the possibility of calling witnesses in his defense, Corey was informed in writing by the Court that "no testimony will be adduced" at this "original proceeding." (Record 523) Following legal argument—all the "original proceeding" Corey was to receive—the Supreme Court ruled that Corey was guilty of misrepresentation amounting to fraud. It found that Corey, as an attorney and corporate officer, was aware of the two differing construction contracts and failed to inform State Savings that the actual construction contract cost was less than the amount represented. Based on these findings, it held petitioner in violation of Canons 15, 16, 29 and 32, and ordered his suspension from practice. Canon 9, the only canon referred to earlier, was not mentioned.

REASONS FOR GRANTING THE WRIT

This petition raises significant issues concerning the extent to which due process and confrontation rights apply in disciplinary proceedings against attorneys. This Court has previously considered the fair notice required in lawyers' disciplinary proceedings. In *In re Ruffalo,* 390 U.S. 544 (1968), the Court concluded that because disciplinary proceed-

ings may culminate in imposition of punishment, such proceedings are adversary or quasi-criminal in nature, and fair notice of charges is essential and must be given before the attorney is compelled to present his defense. In this instance, Corey was denied the fair notice mandated by *Ruffalo*.

Corey was also denied the equally essential right to confront his accusers in the forum in which his "misconduct" was to be decided, for he was not permitted to cross-examine witnesses whose testimony in a prior civil proceeding formed the sole basis of the charges against him. In *Willner* v. *Committee on Character & Fitness*, 373 U.S. 96 (1963), this Court held confrontation required in an admissions case. A disciplinary proceeding presents an *a fortiori* case.

And he was denied the right to an impartial tribunal, one that had not prejudged his case or been subjected to ex parte communications. The Supreme Court of Hawaii denied Corey these rights in a proceeding irregular under its own well-established practice.

A. Contrary to This Court's Decision in Ruffalo, Petitioner Was Charged With a Violation of Canon 9 of the New Canons, but Was Found Guilty of Violating Former Canons 15, 16, 29 and 32.

This Court in *In re Ruffalo*, 390 U.S. 544, 550-52 (1968), established that an attorney facing disciplinary action is entitled to "procedural due process," including full and fair notice of the precise standard by which his conduct is to be judged *before* being called upon to make his defense. Corey was denied that essential right of procedural due process.

The show-cause order issued to Corey, the entire text of which is set out above at page 12, referred

to the *State Savings* record as the sole basis for the proposed disciplinary action. It did not specify which conduct addressed in that lengthy record was the subject of inquiry, nor did it identify any canon or other standard by which Corey's conduct was to be measured. All that Corey had to go on was the fact that in its earlier opinion in the *State Savings* case, the Court had focused upon alleged misrepresentation of the true value of the construction contract and had expressly pointed to Canon 9 of the ABA's Code of Professional Responsibility, which provides that: "A lawyer should avoid even the appearance of professional impropriety." Corey's repeated plea for greater specificity and for a bill of particulars was denied.

Canon 9 provides little in the way of notice. But the "Ethical Considerations and Disciplinary Rules" that accompany Canon 9 do provide some content. They indicate that to avoid the appearance of impropriety, a lawyer should not accept private employment in a matter in which he has acted in a judicial capacity, accept employment in a matter in which he had substantial responsibility while a public employee, state or imply that he can improperly influence any tribunal, legislative body or public official, and that he must preserve the identity of funds and property of clients. See DR 9-101, 9-102 of the Code of Professional Responsibility (1970) (Appendix D hereto).

Left to speculate about the focus of the inquiry, Corey speculated in error. For upon reading the opinion announcing his suspension from the practice of law, Corey learned *for the first time* that at issue in the now concluded proceeding was whether he had violated four of the Canons of Professional Ethics of

the American Bar Association, as formulated in 1908 and which applied to the conduct of Hawaiian attorneys back in 1963.[8] He learned also that the Court had concluded that somewhere in the record of *State Savings* there was proof that he had violated Canon 15 (how far a lawyer may go in supporting a client's cause), Canon 16 (restraining clients from impropriety), Canon 29 (upholding the honor of the profession), and Canon 32 (the lawyer's duty in its last analysis).

Corey was not being obtuse. The Attorney General, commanded to serve as *amicus* and to propose the only specifications against Corey, was equally mystified. His legal memorandum to the Court (Record 87-89) referred to none of the 1908 canons ultimately relied upon, but instead dealt only with the new Canon 9 and an obscure statute not mentioned by the Court.

Ruffalo does not permit the imposition of sanctions against lawyers in these circumstances.

B. Petitioner Was Denied His Constitutional Right To Confront His Accusers.

In the context of the disciplinary proceeding, the testimony of Brown, Young and other witnesses in *State Savings* was concededly hearsay, and admissible under no recognized exception to the rule against hearsay other than the "rule" prevailing in some jurisdictions—and argued below by the Attorney General (Record 69-70)—that lawyers facing punishment are not

[8] One may surmise that in the course of its deliberations the Court discovered that Canon 9, which it had referred to in *State Savings*, was not in existence in 1963 when the alleged misconduct occurred, and that it was compelled belatedly to insert into the case the not heretofore mentioned 1908 Canons.

entitled to the benefit of the rules of evidence available to anyone else.

The Supreme Court of Hawaii denied Corey any opportunity to cross-examine Brown, to examine Campbell who was counsel and not a witness in *State Savings,* or effectively to cross-examine Young, who had been a co-defendant and whose testimony was relied upon by the Supreme Court in its initial censure of Corey. Corey had a right to challenge their testimony and to expose their demeanor while under pressure—and to do so in the presence of those who would determine his right to continue to practice law. In foreclosing this opportunity, the Supreme Court of Hawaii denied him his right to procedural due process, including his rights under the Confrontation Clause.

In *Willner* v. *Committee on Character & Fitness,* 373 U.S. 96, this Court held that a law school graduate may not be denied admission to the bar without procedural due process, including "confrontation and cross-examination of those whose word deprives a person of his livelihood." 373 U.S. at 103.[9] If an applicant for admission to the bar is entitled to cross-examine adverse witnesses and to probe ex parte complaints, the plight of a long-time practitioner faced with disbarment or suspension presents an *a fortiori* case.

In other contexts, too, this Court has recognized the necessity for permitting one threatened by adverse governmental action to confront his accusers. In *Greene* v. *McElroy,* 360 U.S. 474 (1959), for example, the Court held that an engineer working on classified government contracts could not be deprived of his

[9] Here, too, ex parte complaints played an improper role in the decision sought to be reviewed. 373 U.S. at 106.

security clearance in a proceeding where he had no chance to confront and examine his accusers—whose "confidential reports" were not unlike the surreptitious ex parte letters sent to the Supreme Court of Hawaii by Campbell and Brown. The Court noted that:

> "While [confrontation] is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might by faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." 360 U.S. at 406.

And in *Goldberg* v. *Kelly,* 397 U.S. 254, 266-70 (1970), this Court ruled that welfare benefits may not be terminated without according recipients their constitutional right to confront and cross-examine adverse witnesses "before the official who finally determines continued eligibility." In language particularly appropriate to the Hawaii Court's insistence that this remain a paper case, Mr. Justice Brennan observed that:

> "Particularly where credibility and veracity are at issue . . . written submissions are a wholly unsatisfactory basis for decision. . . . In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." 397 U.S. at 269.

Were Corey on trial for an alleged criminal offense, no one would seek to deprive him of his liberty on the transcript of testimony elicited in a prior proceeding—at least where, as here, the witness was available to testify afresh or, at a minimum, to be cross-examined

anew in the very proceeding in which the accused's liberty was at hazard. See, e.g., *Barber* v. *Page,* 390 U.S. 719 (1968), where this Court held that a state hearsay exception was no defense to a confrontation claim where the state made no good-faith effort to produce the absent witness. See also *Motes* v. *United States,* 178 U.S. 458 (1900); *Chambers* v. *Mississippi,* 410 U.S. 284 (1973). This Court has recently held that prior testimony may only be used at a criminal trial—even when the witness had been subjected to cross-examination in the prior proceeding—when "the witness is [now] present and subject to cross-examination [and] there is ample opportunity to test him as to the basis for his former statement." *California* v. *Green,* 399 U.S. 149, 154 (1970), citing 3 Wigmore § 1018. For, as Mr. Justice White noted, "it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the confrontation clause." *California* v. *Green,* 399 U.S. at 157. Indeed, in *Mancusi* v. *Stubbs,* 408 U.S. 204, 216 (1972), this Court held that a finding of unavailability is a "requirement of the confrontation clause" when testimony of a previously cross-examined witness is sought to be used. In short, the fact that the witness had been cross-examined in the prior proceeding does not satisfy the Confrontation Clause's requirement that he be subject to examination and his demeanor exposed to the fact-finder in the later proceeding. As put by Mr. Justice Marshall, "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." *Barber* v. *Page,* 390 U.S. at 725.

Moreover, notions of fairness and due process preclude use of prior testimony even in a *civil* proceeding involving only money or property—absent a showing that the witness is not now available. That is the rule in Hawaii in ordinary civil cases. *Levy* v. *Kimball*, — Haw. 540 (1970). See also Fed. R. Civ. Proc. 32(a)(3), setting out the limitations on use at trial of a non-party's deposition.

In one trial, counsel may for good tactical reasons elect to allow a witness' testimony to proceed without challenge, acquiesce in otherwise inadmissible testimony, attack a witness from one perspective rather than another, or follow some other course. Among the legitimate considerations which a trial lawyer might take into account are the witness' demeanor on direct examination; the jury's reaction to the witness and to attacks upon him; the stakes involved—the amount in issue and the availability of insurance or some other source of indemnification; how the proceedings seem to be going—i.e., the likelihood of an adverse result; and the interests of other parties. See, e.g., Keeton, Trial Tactics and Methods pp. 94-165 (1973 ed.). The different setting of a second trial might dictate an entirely different course of action.

The present case underscores the wisdom of this rule, now of Sixth Amendment dimension, that the transcript of prior testimony, even when sworn and subject to cross-examination, may not be admitted in lieu of live testimony of an available witness. In the *State Savings* litigation, Corey has reason to believe that he need not tackle the adverse witnesses in all-out fashion, for he reasonably believed that plaintiff could not prove

damages.[9a] Moreover, the special posture of the *State Savings* case put Corey in a difficult position. There were three defendants, each somewhat differently situated. Each had an incentive to put the blame, if any, upon one or more of the others. Defendant Young did follow such a tack, and with success—the jury did not find against him on the "fraud" count. The harder each defendant fought to extricate himself, the easier it would be for plaintiff to sit back and pick up the pieces. Corey, as a lawyer, was likely to be the most vulnerable to mutual recriminations among the defendants.[10]

Needless to say, in a proceeding in which Corey was the only accused and in which his professional life was at stake, an entirely different set of considerations would apply. Here, he would have an unfettered opportunity to attack Brown's glib assurance that he relied on the value of the construction contract and not the independent appraisal, and to challenge the testimony of his former co-defendant Young. And in doing so, he would have the invaluable opportunity to put the demeanor of the witness before the ultimate fact-

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[9a] The discrepancy between the two contracts bore no relation to the damages claimed, and Corey knew at the time of trial that plaintiff had made a handsome profit on the transaction—not the "loss" for which it sought compensation. Indeed, the trial judge set the jury's verdict aside in response to these arguments, affirming the reasonableness of Corey's position.

[10] The Supreme Court did point in its opinion in *State Savings* to defendant Young's effort to blame Corey—testimony Corey was effectively restrained from challenging at trial but which he would be free to attack *in a subsequent disciplinary hearing.*

finders.[11] But the ruling of the Supreme Court of Hawaii that he was to be impaled on the cold record of the prior proceeding deprived him of any opportunity effectively to confront his accusers.

Naked reliance upon the cold record of testimony adduced in a prior proceeding, either civil or criminal, is not uncommon in lawyers' disciplinary proceedings. See, Annotation, *Admissibility in proceeding to inquire into conduct of attorney, of evidence or record in separate proceeding involving or indicating his corrupt or improper conduct,* 161 A.L.R. 898, 901 (1945). But in rejecting Corey's argument that *Ruffalo* entitled him to confront the witnesses against him (and he had never any opportunity to cross-examine Campbell, his surreptitious accuser), Hawaii seems to have gone farther than other states. A few states, like Illinois, apply their regular rules of evidence and exclude from disciplinary proceedings all prior testimony except where the prior witness is no longer available.[12] Others admit such prior testimony despite the availability of

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[11] He would have the right, as described in *Mattox* v. *United States,* 156 U.S. 237, 242-243 (1895) to "a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

[12] See, e.g., *People ex rel. Chicago Bar Ass'n* v. *Amos,* 246 Ill. 299, 92 N.E. 857 (1910), where the Court noted over a half century ago that "It is not consonant with law or justice that the respondent's right to practice law should be determined upon evidence which would not be competent against him if he were sued for a debt." *Tennessee Bar Ass'n* v. *Freeman,* 362 S.W. 2d 828 (Tenn. App. 1961).

the prior witness, on the theory that these proceedings are not adversarial, but then permit additional examination as a matter of grace if not of right.[13] Whether any other state relies on prior testimony without providing the accused an opportunity to cross-examine before the disciplining body is not clear.[14] What is clear is that Hawaii's "no testimony will be adduced" rule is unconstitutional. If the "rule" is an anomaly, its correction by this Court is essential to redress a manifest violation of Corey's rights, particularly where as here Corey has had no appellate review.

Where witnesses whose prior testimony is relied upon in lawyers' disciplinary proceedings are available to testify or to be cross-examined, use of their prior testimony without opportunity to cross-examine before the ultimate factfinder raises substantial questions of fairness and constitutional right which need to be addressed by this Court.

C. Petitioner Was Denied a Hearing by an Impartial Tribunal.

If the proceeding below had been a criminal prosecution, the publicly stated prejudgement by the factfinder and the ex parte contacts between the factfinder and Corey's accusers would require reversal here. As Mr. Justice Holmes observed in *Patterson* v. *Colorado*, 205 U.S. 454, 462 (1907) "the theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private

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[13] See, e.g., *People* v. *Howard*, 364 P.2d 380 (Colo. 1961); *Louisiana State Bar Ass'n* v. *Sackett*, 231 La. 655, 92 So. 2d 571 (1957); *In re Lacy*, 112 S.W. 2d 594 (St. L. Mo. Ct. of App. 1937).

[14] See *In re Santosuosso*, 62 N.E. 2d 105 (Mass. 1945).

talk or public print." See *Estes* v. *Texas,* 381 U.S. 532 (1965). Due process also requires disqualification from participating in governmental regulatory adjudication which one has publicly prejudged. See, e.g., *Texaco, Inc.* v. *F.T.C.,* 336 F.2d 754, 759-61 (D.C. Cir. 1964), disqualifying FTC Chairman Dixon from adjudging a cause about which he had previously made a speech containing censure like that addressed here to Corey. The teaching of *Ruffalo* is that no less a standard should apply when a lawyer is faced with disbarment or suspension, for such a proceeding should remain untainted by "private talk" or appearance of partiality. Cf. *Willner* v. *Committee on Character & Fitness,* 373 U.S. at 106; *Greene* v. *McElroy,* 360 U.S. at 497-99.

This was an unusually aggravated situation. The Supreme Court had prejudged the matter, and had done so publicly. If it now found that Corey was not guilty of misconduct, its harsh prior statement would become extremely embarrassing. This is just the kind of "possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true. . . ." that must be avoided if due process is to be observed. *In re Murchison,* 349 U.S. 133, 136 (1955), quoting *Tumey* v. *Ohio,* 273 U.S. 510, 532 (1927). The Court knew, although Corey did not, that it had been the subject of a surreptitious campaign, conducted ex parte, to poison the well. Yet it had no reason to insist upon trying this matter itself. The long established practice in Hawaii, and the only one contemplated by its own Rule 16(c), was to refer all such charges to an impartial tribunal of commissioners. From their determination, the Supreme Court of Hawaii would only act as a reviewing body.

Despite the Court's awareness that it had publicly prejudged the case and had been subjected to "private talk," it went out of its way to depart from existing procedure. It ignored its own Rule 16(c), and jerry-built a special original proceeding before the one set of factfinders who had already prejudged Corey's case.

Corey was entitled to have his professional status adjudicated by an impartial tribunal. His federal constitutional right to that effect was not honored here. The issue requires plenary review.[15]

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[15] On December 27, 1973, only one month after entering judgment against Corey, the Supreme Court of Hawaii announced a revision of its own Rule 16, dealing with disciplinary proceedings against lawyers. The new rule, set out in Appendix E hereto, on its face purports to guarantee to accused lawyers some form of the rights denied to Corey. Accusations against lawyers are to be referred to a professionally staffed commission, whose counsel will conduct investigatons. An accused attorney is expressly entitled to written notice of the charges against him, "sufficiently clear and specific to inform the respondent of the alleged misconduct." Rule 16.7(b) At any hearing on such charges, an accused lawyer is expressly entitled to "confront and cross examine" his accusers and to submit evidence. Rule 16.7(b). Any commissioner called upon to review an investigative report compiled by the commission's counsel is thereafter disqualified from sitting as a judge in the matter. Rule 16.7(a) Following any determination by the commission, there is to be appellate review in the Supreme Court. Rule 16.7(c)

The new rule is noteworthy in several respects. It seems expressly to confer upon accused lawyers some form of the rights denied to Corey. In consequence, it can hardly be argued that policy considerations require that accused lawyers in Hawaii be treated as was Corey.

But enactment of the new rule does not obviate the necessity for review by this Court. First, the new rule does not redress the wkrong to Corey. Second, just as the Supreme Court concluded in Corey's case that it had inherent power to ignore the factfinding procedure provided for in its own Rule 16(c) and substitute for

CONCLUSION

For the foregoing reasons, petitioner urges the Court to grant the writ of certiorari to review the judgment of the Supreme Court of Hawaii.

Respectfully submitted,

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March 28, 1974

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it an original proceeding in the Supreme Court, nothing in the new rule precludes the Court from doing so in a future case. In short, the rule is effective only in those cases where the Court chooses to apply it. Third, enactment of the rule does not ensure that accused lawyers in Hawaii, or anywhere else, will be given their federal constitutional right to fair notice of the charges against them, to confront their accusers in the forum in which their conduct is to be judged, and to an impartial tribunal. For absent a decision by this Court that these rights apply, the Supreme Court of Hawaii will be free to interpret the amended Rule 16 as a matter of state, not federal law.

APPENDIX A

SUPREME COURT OF HAWAII—1

SYLLABUS

IN THE MATTER OF RALPH E. COREY, ATTORNEY AT LAW

No. 5344

OCTOBER 19, 1973

RICHARDSON, C. J., ABE, LEVINSON AND KOBAYASHI, J. J., AND CIRCUIT JUDGE VITOUSEK IN PLACE OF MARUMOTO, J., RECUSED

ATTORNEY AND CLIENT—*jurisdiction of courts.*

The supreme court has authority over matters concerning disciplinary action of members of the bar.

SAME—*character and conduct.*

Active participation in fraud or even silence of an attorney where he has knowledge of the current perpetration of a fraud by his client upon another is professional misconduct which merits disciplinary action by the court.

SAME—*same.*

An attorney engaged in practice of law is held to the same highest standards of ethical and moral uprightness and fair dealing when acting as a businessman or when acting as a lawyer and is subject to disciplinary action if he fails to maintain those standards in either capacity.

SAME—*same.*

While commercial activities are not forbidden a lawyer, he must see that his dealings as a businessman are as upright as should be his dealings in his professional capacity.

Per Curiam. This is an original proceeding initiated by this court on an order to show cause issued by this court ordering respondent Ralph E. Corey, Esq., to file a written statement showing cause why he should not be censured,

suspended, or disbarred from all the courts of the State of Hawaii based on the record of the case entitled *State Savings and Loan Association* v. *Ralph E. Corey and Robert M. Kimbrough and Wallace C. S. Young*, No. 5021. The attorney general of the State of Hawaii was requested, personally or through a deputy, to appear in the proceeding as amicus curiae.

By order of this court filed November 16, 1972, this court ordered, *inter alia*, as follows:

> a. Respondent's request for permission to inspect the records and files of the Supreme Court Rule 16(c) Commission relating to this matter is granted:
>
> b. The attorney general, or his deputy appearing in this matter, shall serve upon the respondent's attorney and file with the clerk of this court a specification of such portions of the transcript and exhibits in said State Savings case, No. 5021, as, in his opinion, would support action by this court in censuring, suspending or disbarring respondent, together with a memorandum of law in support of such opinion;
>
> c. Respondent shall serve upon the attorney general and file with the clerk of this court a specification of such portions of the transcript and exhibits in said State Savings case, No. 5021, as, in his opinion, indicate that this court should not censure, suspend or disbar respondent, *together with such offer of proof as respondent may wish to make in additional support of respondent's position*, together with a memorandum of law in support of respondent's opinion, *it being understood that the attorney general or his deputy shall have the burden* of proof in justifying disciplinary action against the respondent. (Emphasis added).

The specifications and memoranda of law were filed by the attorney general and the respondent. However, though given the opportunity, the respondent failed to

file any offer of proof which would additionally support respondent's position herein.

This court has jurisdiction over matters concerning disciplinary action of members of the bar. HRS § 605-1, as amended by Act 184, sec. 1(a), S.L.H. 1972.

After a thorough and complete review of the record of said case we are of the opinion that respondent is guilty of misrepresentation amounting to fraud and thus as an attorney is guilty of professional misconduct. The record of said case shows that respondent, who was a substantial shareholder, a corporate officer (vice president) and corporate attorney of Kauaian Development Company, a corporation, committed said misrepresentation in his effort to obtain for said corporation a mortgage loan from State Savings and Loan Association for the construction of a hotel-condominium.

A brief summary of the facts herein is as follows:

Respondent, as attorney and corporate officer, was fully aware of the fact that there were two construction contracts:

1. Construction contract dated October 28, 1963, stating in pertinent parts as follows:

WITNESSETH, that the Contractor [Better Built Hawaii, Ltd.] and the Owner [Kauaian Development Company, Inc.] for the considerations hereinafter named agree as follows:

. . . .

The Contractor shall furnish all of the materials and perform all of the work shown on the Drawings and described in the Specifications entitled "The Kauaian Hyatt House" prepared by . . . , acting as and in these Contract Documents entitled the Architect; and shall do everything required by this Agreement, the General Conditions of the Contract, the Specifications and the Drawings.

. . . .

The Owner shall pay the Contractor for the performance of the Contract, subject to additions and deductions provided therein, in current funds as follows: SEVEN HUNDRED SIXTY-ONE THOUSAND FIVE HUNDRED AND NO/100 DOLLARS ($761,500.00). THE OWNER SHALL HAVE THE OPTION TO PAY THE CONTRACTOR AN ALTERNATE CONTRACT AMOUNT OF: COST PLUS 7%, COST BEING DETERMINED BY STANDARD A.I.A. ACCOUNTING PROCEDURE.

2. Construction Contract dated November 8, 1963, executed by and between Better Built Hawaii, Ltd., as contractor, and Kauaian Development Company, Inc., as owner, stating as follows:

It is agreed between Better Built Hawaii, Inc. and Kauaian Development Company, Inc. that a new cost figure has been reached relative to the Kauaian Hyatt House and subject price is now $600,000 total cost for all contractual work, including rock wall and fill and pier facilities. In addition, an agreement is reached whereby any savings under $600,000 will be divided equally between Better Built Hawaii, Inc. and Kauaian Development Company, Inc. In addition, Mr. Emil A. Offer, and/or Better Built Hawaii, Inc. will receive $60,000 worth of apartments in the Kauaian Hyatt House upon completion of the contract.

The construction contract dated October 28, 1963, was not for the purpose of actual construction but was executed only for the purpose of obtaining construction financing from State Savings and Loan Association. However, State Savings and Loan Association was not informed that said construction contract was for financing purposes only and not for actual construction purposes and was led to believe that the said contract was the actual construction contract. The actual contract for

construction purposes was the contract dated November 8, 1963. Notwithstanding the existence of the actual construction contract, respondent as said corporate attorney and corporate officer represented to State Savings and Loan Association that the cost of construction of the improvements was determined on the construction contract referring to a maximum amount of $761,000.00, and respondent failed to inform and/or cause to have the said mortgagee informed that the actual construction contract cost was $600,000.00 plus rather than premised on the contract referring to the sum of $761,000.00. Said representation by respondent was by direct actions and also by way of acquiescence through silence on the part of respondent during various meetings held with the mortgagee in their discussions, negotiations and consummation of the mortgage loan.

The record of the present proceeding substantiates the fact to be that the purpose of respondent in failing to inform the mortgagee of the actual cost of construction in the sum of $600,000.00 plus was to acquire a larger mortgage loan than would have been possible if the actual construction contract had been used for the financing purposes. Mortgagee, not knowing of the actual construction contract and relying on respondent's representation that the cost of construction was determined on the contract referring to the sum of $761,000.00, did on January 17, 1964, grant the mortgage loan in question to respondent's corporation.

The conduct of the respondent was in violation of the following canons of ethics which were in effect when said misrepresentation occurred:[1]

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[1] Under Rule 16(a) of the Rules of the Supreme Court of Hawaii which were applicable at the time the misrepresentation occurred in November-December, 1963, the cannons of professional ethics as adopted by the American Bar Association were in effect and are applied here.

Canon 15—HOW FAR A LAWYER MAY GO IN SUPPORTING A CLIENT'S CAUSE . . . . The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

Canon 16—RESTRAINING CLIENTS FROM IMPROPRIETIES. A lawyer should use his best efforts to restrain and to prevent his clients from doing these things which the lawyer himself ought not to do, . . . If a client persists in such wrongdoing the lawyer should terminate their relation.

Canon 29 — UPHOLDING THE HONOR OF THE PROFESSION . . . . He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

Canon 32 — THE LAWYER'S DUTY IN ITS LAST ANALYSIS. No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive, nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation.

. . .

In a case involving the participation of an attorney in the fraudulent sale of a bakery, the New York Supreme Court, Appellate Division, found the attorney "... guilty of professional misconduct by reason of his active participation in the fraud, his silence when he knew the buyer

was being defrauded and his violation of a fiduciary relationship as escrow holder of the moneys paid by the buyer", and disbarred him. *In re Sherman,* 65 N.Y.S.2d 802, 803, 271 A.D. 462 (1946).

> It is well settled that an attorney engaged in practice of law is held to the same "highest standards of ethical and moral uprightness and fair dealing" when acting as a businessman or when acting as a lawyer and is subject to disciplinary action if he fails to maintain those standards in either capacity. *Marco* v. *Dulles,* 169 F.Supp. 622, 631 (S.D.N.Y. 1959).
>
> While commercial activities are not forbidden a lawyer, he "must see that his dealings as a business man are as upright as should be his dealings in his professional capacity" . . . *Matter of Chartoff,* 116 A.D.2d 277, 280, 227 N.Y.S.2d 578, 581 (1962).

The above stated principles regarding the conduct of an attorney either in his professional capacity or as a businessman are those for which we find Mr. Corey has shown a complete disregard.

The respondent has failed to show cause why he should not be censured, suspended or disbarred. Issues raised in this proceeding by respondent are without merit.

We therefore, based on the record herein, suspend his license to practice law before all the courts of the State of Hawaii for a period of six months effective thirty days after entry of judgment in this case by this court.

Helen B. Ryan (Ryan and Ryan of counsel) for respondent.

E. John McConnell, Jr., Deputy Attorney General (*George Pai,* Attorney General, of counsel) for State of Hawaii, amicus curiae.

APPENDIX B

No. 5344

IN THE SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1973

In the Matter of

RALPH E. COREY,
Attorney at Law

JUDGMENT

Pursuant to the opinions of the Supreme Court of the State of Hawaii filed in this original proceeding on October 19, 1973 and November 5, 1973;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the license of respondent Ralph E. Corey, Esq., to practice law before all the courts of the State of Hawaii be suspended for a period of six months;

IT IS HEREBY FURTHER ORDERED, ADJUDICATED AND DECREED, that such suspension shall be stayed on the following terms:

a) that respondent, without delay, initiate his contemplated petition for writ of certiorari or appeal to the Supreme Court of the United States and expeditiously complete his requirements for said petition or appeal;

b) that the stay granted herein shall remain in effect until the conclusion of the review of the judgment of this court by the Supreme Court of the United States;

c) that, in the event the Supreme Court of the United States denies respondent's petition for a writ of certiorari or appeal or sustains the judgment of this Court in suspending respondent's license to practice law, the said suspension shall become effective thirty days from the date

of said denial or order of the Supreme Court of the United States.

DATED: Honolulu, Hawaii, Nov. 28, 1973.

By the Court:
Clerk

APPROVED:

/s/ BERT T. KOBAYASHI
Bert T. Kobayashi
Justice

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1973

PETITION FOR REHEARING AND IN THE ALTERNATIVE A MOTION FOR STAY PENDING PETITION FOR A WRIT OF CERTIORARI

NOVEMBER 5, 1973

RICHARDSON, C. J., ABE, LEVINSON AND KOBAYASHI, J. J., AND CIRCUIT JUDGE VITOUSEK IN PLACE OF MARUMOTO, J., RECUSED

Per Curiam. The petition for rehearing is denied without argument.

The motion for stay pending petition for a writ of certiorari to the Supreme Court of the United States is granted on the following terms:

a) that respondent, without delay, initiate his contemplated petition for writ of certiorari or appeal to the Supreme Court of the United States and expeditiously complete his requiredments for said petition or appeal;

b) that the stay granted herein shall remain in effect until the conclusion of the review of the judgment of this court by the Supreme Court of the United States;

c) that, in the event the Supreme Court of the United States denied respondent's petition for a writ of certiorari or appeal or sustains the judgment of this court in suspending respondent's license to practice law, the said suspension shall become effective thirty days from the date of said denial or order of the Supreme Court of the United States.

Helen B. Ryan (Ryan & Ryan
of counsel) for the
petition.

/s/ William R. Richardson

/s/ Kazulisan Abe

/s/ Bernard H. Levinson

/s/ Bert T. Kobayashi

/s/ Betty M. Vitousek

APPENDIX D

RULES OF THE SUPREME COURT OF THE STATE OF HAWAII

RULE 5. REHEARING

(a) *Time and Form.* A petition for rehearing may be presented only within 10 days after the filing of the opinion or ruling unless by special leave additional time is granted during such period by a justice. The petition shall briefly and distinctly state its grounds and shall include points and authorities relied on in support thereof and shall also be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay.

(b) *Argument; Reply; Allowance.* No reply to a petition for rehearing will be received unless requested by the court or by a justice who concurred in the opinion or ruling and no petition for rehearing will be granted in the absence of such a request. There shall be no oral argument on a petition for rehearing.

RULE 10. JUDGMENT; MANDATE

Judgment; Mandate. In all cases a final judgment of this court pursuant to the opinion or ruling disposing of the cause before this court shall be prepared by the prevailing party and submitted to the clerk for entry and filing within 10 days. Upon presentation to the clerk, the clerk shall forthwith present the same to a justice for approval and upon approval, the same shall forthwith be entered and filed. Upon expiration of the time for filing a petition for rehearing, or if such petition has been timely filed, upon the disposition of such petition, a mandate shall issue in appeals as a matter of course informing the court below of the proceedings in this court and of any further required proceedings; provided that the mandate may issue at any time after the entry of final judgment on the order of the court. Upon motion for cause shown the mandate may be stayed or any mandate that has been issued may be recalled.

RULE 16. UNPROFESSIONAL CONDUCT AND UNAUTHORIZED PRACTICE OF LAW

(a) *Canons.* The Canons of Professional Ethics attached hereto as Exhibit A shall govern the conduct of the members of the Hawaii Bar.

(b) *Appointment of Commission.* The court shall appoint a commission of not less than 15 members of the Hawaii Bar as commissioners of this court in proceedings involving unprofessional conduct of members of the Hawaii Bar and unauthorized practice of law by any person, and shall designate the chairman thereof. The terms of office of the commissioners shall be designated by the court. They shall receive no compensation for their services but may be reimbursed for their traveling and other expenses incidental to performance of their duties.

(c) *Functions, Powers and Duties of Commissioners and Committee on Inquiry; Procedure.*

(1) The commission is empowered to inquire into and investigate charges of unprofessional conduct by members of the Hawaii Bar and unauthorized practice of law by any person and, upon the filing with the commission of a written complaint of such unprofessional conduct or unauthorized practice, to hear and determine the charges and report its findings and recommendations to this court.

(2) The commission shall adopt rules for its procedure and file them with the clerk of this court. Such rules shall become effective upon approval of this court.

(3) Any person, including the Attorney General and the Bar Association, may file a charge with the commission.

(4) Whenever a charge of unprofessional conduct or of unauthorized practice of law is received, the chairman of the commission, unless otherwise ordereed by two-thirds of the commission, shall appoint a committee on inquiry consisting of 3 or more members of the bar and refer the charge to it, if in his opinion the charge alleges a violation of the canons of professional ethics or unauthorized practice of law. The chairman of the committee on inquiry shall be a commissioner.

(5) The committee on inquiry shall conduct its investigation promptly. It shall have power to summon witnesses and to hear testimony, and may conduct its investigation in such manner as may be necessary and proper to obtain all pertinent information. The respondent, i.e., the person against whom a charge has been made, shall be notified in writing by the committee of such investigation and shall have a right to be heard.

(6) The committee on inquiry shall submit a written report of its findings and recommendations to the commission. If the committee recommends that no hearing be

held on the charge of unprofessional conduct or unauthorized practice of law, and if the commission concurs with the recommendation, the matter shall be closed. The chairman shall thereupon notify the complainant and the respondent of the commission's action. If the commission does not concur with the recommendation of the committee, the commission may instruct its chairman to appoint a new committee on inquiry, and if two-thirds of the commission does not concur with the recommendation by the committee, the hearing of the charge may be held by the commission or the charge dismissed as the case may be.

(7) If the committee on inquiry recommends that a hearing be held on the charge of unprofessional conduct or unauthorized practice of law, it shall prepare and submit to the chairman of the commission a written complaint and a report in support thereof.

(8) A complaint shall be sufficiently clear and specific to inform the respondent of the alleged unprofessional conduct or unauthorized practice.

(9) Upon receipt of the complaint, the chairman of the commission shall cause a copy thereof to be served upon the respondent by personal service, together with a copy of the rules of the commssion, if any. Personal service upon the respondent may be made by any person who is at least 20 years of age, including any commissioner. In the event that the respondent cannot be found within the State of Hawaii or has departed therefrom, service may be made by registered or certified mail if his address is known. If he cannot be found within the state and if his address is not known, service may be made upon the clerk of this court. The respondent shall file with the commission a written answer to the complaint within 30 days after the date of service, which time may be extended by the chairman of the commission.

(10) If the respondent's answer involves any questions of law, a memorandum in support thereof shall be

attached to the answer. A respondent waives all defenses and objections not presented in his answer, except the defenses (a) that the complaint fails to allege acts or omissions constituting unprofessional conduct or the unauthorized practice of law; (b) that the commission lacks jurisdiction of the subject matter. If the respondent fails to file an answer in the time allowed, he shall be in default.

(11) Nine members of the commission shall constitute a quorum for determining what action is to be taken upon the recommendation of a committee on inquiry and for determining whether a hearing on the charge should be had by the commission without prior reference to a committee on inquiry. At the hearing of the complaint by the commission, the committee on inquiry, or such other attorney or attorneys as are designated by the chairman of the commission, shall present evidence in support of the allegations of the complaint. Three members of the commission shall constitute a quorum for a hearing in each case coming before it. In the event of a recessed hearing, a quorum at each hearing after the first hearing shall be three commissioners who have attended all of the previous hearings. No commissioner who was a member of the committee on inquiry investigating the charges shall be qualified to hear the matter. The hearing of such complaint by the commission shall be completely and accurately recorded.

(12) The proceedings under this rule shall not be public but shall be private and confidential unless the respondent shall in writing request otherwise. The record shall not be made public unless and until a report recommending discipline or recommending that a judgment be issued is filed with the court and the court has acted thereon.

(13) Committees on inquiry, by their chairmen, and commissioners hearing charges may administer oaths and affirmations and compel by subpoena the attendance of witnesses and the production of pertinent books, papers and

documents. Writs of subpoena shall be issued in blank by the clerk of this court upon application by any commissioner or the respondent. A witness shall be paid mileage and witness fees as provided by the law of this state in civil cases. Failure to obey any such subpoena or refusal without lawful grounds of any person to be sworn to testify or to answer any proper question shall constitute contempt of this court. Part V of the Hawaii Rules of Civil Procedure, relating to depositions and discovery, shall apply to proceedings before the commission instituted pursuant to this rule.

(14) To warrant a finding of unprofessional conduct or of unauthorized practice of law, the charge must be established by clear and convincing evidence.

(15) After the hearing, if the commission recommends discipline by the court in cases involving unprofessional conduct, or recommends a judgment of the court in cases involving unauthorized practice of law, it shall file a written report of its findings and recommendations with the court. Thereupon the matter shall be docketed in the name of the respondent. The committee on inquiry, Attorney General, or such other attorney or attorneys as are designated by the chairman of the commission, shall act as attorneys for the commission. After the filing of such report a copy thereof shall be served on the respondent as hereinbefore provided for the service of the complaint.

(16) The respondent may file exceptions to the report within 20 days from the date of service of a copy thereof or within an additional period not to exceed 20 days granted by the court for good cause shown. Unless such exceptions are predicated solely on the report, the respondent, within 10 days after the filing of such exceptions, shall file with the commission a designation of such parts of the record as he deems necessary to enable the court to pass on such exceptions, and within 10 days thereafter the attorney for the commission may file a designation of any additional

parts of the record deemed necessary to enable the court to pass on such exceptions. Thereupon the commission shall promptly certify to the court the parts of the record so designated and furnish a copy thereof to the attorney for the commission and a copy thereof to the respondent.

(17) Within 60 days after the filing of the certified record, or after the filing of exceptions if no part of the record is designated by the respondent, the respondent shall file an opening brief pursuant to the rule governing civil appeals and other briefs shall be filed as therein provided.

(18) If the respondent fails to file exceptions within the time permitted by the rule, upon motion made by the attorney for the commission the court may enter an order giving effect to the recommendations contained in the report. The court shall adopt the findings of the commission unless upon a consideration of the entire record it is of the opinion that such findings are not supported by clear and convincing evidence.

(d) *Limitations.* The jurisdiction of this court and the other courts of the State of Hawaii to grant appropriate relief in causes involving unprofessional conduct or unauthorized practice of law shall not be deemed to be limited, restricted or abrogated by anything contained in this rule.

CANON 9

A Lawyer Should Avoid Even the Appearance of Professional Impropriety

ETHICAL CONSIDERATIONS

EC 9-1 Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system.[1] A lawyer should promote public confidence in our system and in the legal profession.[2]

EC 9-2 Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer.

On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession. [3]

EC 9-3 After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists. [4]

EC 9-4 Because the very essence of the legal system is to provide procedures by which matters can be presented in an impartial manner so that they may be decided solely upon the merits, any statement or suggestion by a lawyer that he can or would attempt to circumvent those procedures is detrimental to the legal system and tends to undermine public confidence in it.

EC 9-5 Separation of the funds of a client from those of his lawyer not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided.

EC 9-6 Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges

thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.[5]

DISCIPLINARY RULES

DR 9-101 Avoiding Even the Appearance of Impropriety.[6]

(A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.[7]

(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.[8]

(C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body,[9] or public official.

DR 9-102 Preserving Identity of Funds and Property of a Client.[10]

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expresses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm

must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

15. How Far a Lawyer May Go in Supporting a Client's Cause

Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

16. Restraining Clients from Improprieties

A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct toward Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrongdoing the lawyer should terminate their relation.

29. Upholding the Honor of the Profession

Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either

moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

32. The Lawyer's Duty in Its Last Analysis

No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive, nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1973

IN THE MATTER OF THE AMENDMENT

OF

THE RULES OF THE SUPREME COURT
OF THE STATE OF HAWAII.

ORDER AMENDING RULE 16

IT IS HEREBY ORDERED that Rule 16 of the rules of this court, as amended, be further amended as follows:

RULE 16. DISCIPLINARY RULES.

16.1 *Jurisdiction.* Any attorney admitted to practice law in this State and any attorney specially admitted by a court of this State for a particular proceeding is subject to the exclusive disciplinary jurisdiction of the supreme court and the Board hereinafter established.

Nothing herein contained shall be construed to deny to any court such powers as are necessary for that court to maintain control over proceedings conducted before it, such as the power of contempt, nor to prohibit any bar association from censuring a member or suspending or expelling a member from membership in the association.

16.2 *Grounds for Discipline.*

(a) The Code of Professional Responsibility, attached hereto as Exhibit A, as amended by this court, shall govern the conduct of all attorneys subjects to discipline under this Rule.

(b) Acts or omissions by an attorney which violate the Code of Professional Responsibility shall constitute misconduct and shall be ground for discipline, whether or not the act or omission occurred in the course of an attorney-

client relationship. Conviction of a crime shall similarly be ground for discipline as set forth in Rule 16.13.

16.3 *Types of Discipline.* Discipline may consist of:

(a) Disbarment by the supreme court; or

(b) Suspension by the supreme court for a period not exceeding five years; or

(c) Public censure by the supreme court; or

(d) Private reprimand by the Disciplinary Board; or

(e) Private informal admonition by Disciplinary Counsel.

16.4 *Disciplinary Board.*

(a) The supreme court shall appoint a board to be known as the "Disciplinary Board of the Hawaii Supreme Court" (herein referred to as the "Board") which shall consist of nine members of the bar of this State, one of whom shall be designated by this court as chairman and another as vice-chairman.

(b) When the Board is first appointed, three of its members shall be appointed for a term of one year, three for a term of two years and three for a term of three years. All terms thereafter shall be for three years. No member shall serve for more than two consecutive terms. The Board shall act only with the concurrence of five or more members. Members shall receive no compensation for their services but may be reimbursed for their traveling and other expenses incidental to the performance of their duties.

(c) Board members shall refrain from taking part in any proceeding in which a judge, similarly situated, would be required to abstain. If, in any given case, the number of Board members who may properly render a decision falls below a quorum, the supreme court shall ap-

point, for that case only, the number of ad hoc members necessary to restore the Board to full membership. Each ad hoc member shall fulfill all the responsibilities of the Board member whom he replaces.

(d) Periodically, the Chairman shall designate two Board members to review the proposed decisions of the Disciplinary Counsel, as mentioned in subsection 16.7 hereof.

(e) The Board shall exercise the powers and perform the duties conferred and imposed upon it by these Disciplinary Rules, including the power and duty:

(1) To consider and investigate any alleged ground for discipline or alleged incapacity of any attorney called to its attention, or upon its own motion, and to take such action with respect thereto as shall be appropriate to effectuate the purposes of these Disciplinary Rules.

(2) To appoint a Chief Disciplinary Counsel, and such Assistant Disciplinary Counsel and staff as may from time to time be required to properly perform the functions hereinafter prescribed. The Chief Disciplinary Counsel and Assistant Disciplinary Counsel are hereinafter referred to as "Counsel".

(3) To appoint from time to time, and establish the terms of office of, an appropriate number of hearing committees.

(4) To approve assignments made annually by the Chairman for rotation of members of the Board to review for stated periods all recommended dispositions by Counsel and to authorize changes in such assignments from time to time necessitated by unforeseen circumstances.

(5) To adopt rules of procedure governing the Board and hearing committees which are not inconsistent with these Rules.

(6) To adopt and publish advisory opinions interpreting the Code of Professional Responsibility.

16.5 *Hearing Committees.*

(a) Each hearing committee shall consist of three members of the bar of this State. The Board shall designate the terms of its members and the chairman for each committee. Each committee shall act only with the concurrence of a majority of its members. Committee members shall refrain from taking part in any proceeding in which a judge, similarly situated, would be required to abstain. Members shall receive no compensation for their services but may be reimbursed for their traveling and other expenses incidental to the performance of their duties.

(b) Hearing committees shall have the power and duty to conduct hearings in formal disciplinary proceedings and on petitions for reinstatement of disbarred or suspended attorneys, upon assignment by the Chairman of the Board, and to submit their findings and recommendations, together with the record of the proceeding, to the Board.

16.6 *Disciplinary Counsel.*

(a) Counsel shall not engage in private practice, except that the Board may agree to a reasonable period of transition after appointment.

(b) Counsel shall have the power and duty:

(1) With the approval of the Board, to employ and supervise staff needed for the performance of his duties.

(2) To investigate all matters involving alleged misconduct called to his attention whether by complaint or otherwise.

(3)To dispose, subject to review by members of the Board assigned by the Chairman, of all matters involving alleged misconduct by dismissal, private informal admoni-

tion or the institution of formal disciplinary proceedings before a hearing committee. Except in matters requiring dismissal because the complaint is frivolous on its face or falls outside the Board's jurisdiction, no disposition shall be recommended or undertaken by Counsel until the accused attorney shall have been afforded the opportunity to state his position with respect to the allegations against him.

(4) To file with the supreme court certificates of conviction of attorneys for crimes.

(5) To prosecute all disciplinary proceedings and proceedings to determine incapacity of attorneys before hearing committees, the Board and the supreme court.

(6) To appear at hearings conducted with respect to petitions for reinstatement of suspended or disbarred attorneys or attorneys transferred to inactive status because of disability, to examine witnesses and to submit evidence, if any, relevant thereto.

(7) To maintain permanent records of all matters processed and the disposition thereof.

(8) To assist members of the public in preparation of requests for investigation.

(9) Top perform such other duties and provide such reports as the Board shall direct.

16.7 *Procedure.*

(a) *Investigation.* All investigations, whether upon complaint or otherwise, shall be conducted by and under the supervision of Counsel. Upon the conclusion of an investigation, Counsel shall recommend dismissal, informal admonition of the attorney concerned or the institution of formal disciplinary proceedings before a hearing committee. Counsel's recommendation shall be reviewed by one of the two members of the Board assigned for that pur-

pose. If the initial reviewing member of the Board approves Counsel's recommendation, it shall be implemented. If the reviewing member of the Board disapproves Counsel's recommendation, Counsel may request further review by the other reviewing member of the Board. In the event of such second review of Counsel's recommendation, the decision by the second reviewing member of the Board shall be final. The member or members of the Board who review Counsel's recommendation shall be disqualified in any formal disciplinary proceedings in relation to the same alleged misconduct.

(b) *Formal Hearing.* Formal disciplinary proceedings before a hearing committee shall be instituted by Counsel by filing with the Board a petition which shall be sufficiently clear and specific to inform the respondent of the alleged misconduct. A copy of the petition shall be served upon the respondent. The respondent shall serve his answer upon Counsel and file the original with the Board within 20 days after the service of the petition, unless such time is extended by the Chairman. In the event the respondent fails to answer, the charges shall be deemed admitted; provided, however, that a respondent who fails to answer within the time provided may obtain permission of the Chairman to file an answer if such failure to file an answer was attributable to mistake, inadvertence, surprise or excusable neglect. Following the service of the answer or upon failure to answer, the matter shall be assigned by the Chairman to a hearing committee. If there are any issues of fact raised by the pleadings or if the respondent requests the opportunity to be heard in mitigation, the hearing committee shall serve a notice of hearing upon Counsel and the respondent, or his counsel, stating the date and place of the hearing. At every hearing wherein factual issues are to be resolved, the respondent shall have a full opportunity to confront and cross examine the complainant and the other witnesses presented by Counsel and to present evidence on his own behalf. The hearing com-

mittee shall, in every case, submit a report containing its findings and recommendations, together with a record of its proceedings, to the Board within 60 days after the conclusion of its hearing, including the submission of briefs, if any. The findings of the hearing committees shall be supported by a preponderance of the evidence. The hearing committee shall not be bound by the formal rules of evidence, but it shall admit only trustworthy evidence. The hearing committee shall not rely upon any evidence outside the formal record in reaching its decision.

(c) *Review by Board and Supreme Court.* Upon receipt of a report from a hearing committee, the Board shall set the dates for submission of briefs and for oral argument before the Board. The Board shall promptly either affirm or modify the recommendation of the hearing committee, remand the matter for further proceedings before the hearing committee or dismiss the petition. In the event that the Board determines that the proceeding should be concluded by private reprimand, if the respondent shall consent thereto he shall appear before the Board at a time fixed by the Chairman and the Chairman shall deliver the reprimand. Unless the Board shall dismiss or remand the petition or the matter is concluded by private reprimand with the consent of the respondent, the Board shall promptly submit a report containing its findings and recommendations, together with the entire record, to the supreme court. After the filing of such report a copy thereof shall be served on the respondent. The respondent may file exceptions to the report within 20 days from the date of service of a copy thereof or within an additional period not to exceed 20 days granted by the court for good cause shown. Within 60 days after the filing of the report and the filing of exceptions, if any, the respondent shall file an opening brief pursuant to the rule governing civil appeals and other briefs may be filed and oral argument may be had as therein provided. Upon conclusion of the proceedings, the court shall promptly enter an appropriate order.

16.8 *Immunity.* Complaints submitted to the Board or Counsel or testimony given with respect thereto shall be absolutely privileged and no lawsuit predicated thereon may be instituted. Members of the Board, members of the hearing committees, Counsel and staff shall be immune from suit and liability for any conduct in the course of their official duties.

16.9 *Refusal of Complainant to Proceed, Compromise, Etc.* Neither unwillingness nor neglect of the complainant to sign a complaint or to prosecute a charge, nor settlement, compromise between the complainant and the attorney or restitution by the attorney, shall, in itself, justify abatement of the processing of any complaint.

16.10 *Matters Involving Related Pending Civil or Criminal Litigation.* Processing of complaints shall not be deferred or abated because of substantial similarity to the material allegations of pending criminal or civil litigation, unless authorized by the Board in its discretion, for good cause shown.

16.11 *Service.*

(a) Service upon the respondent of the petition in any disciplinary proceeding shall be made by personal service by any person authorized by the Chairman of the Board, except that, in the event that the respondent cannot be found within the State or has departed therefrom, service may be made by registered or certified mail at his address shown in his registration statement filed pursuant to Rule 16.18 or other last known address.

(b) Service of any other papers or notices required by these rules shall be made in accordance with Rule 5 of the Hawaii Rules of Civil Procedure.

16.12 *Subpoena Power, Witnesses and Pre-trial Proceedings.* Any member of a hearing committee, in matters before it, and Counsel, in matters under investigation by

him may administer oaths and affirmations and, subject to HRCP Rule 45(b), compel by subpoena the attendance of witnesses and the production of pertient books, papers and documents. A respondent may, subject to HRCP Rule 45(b), compel by subpoena the attendance of witnesses and the production of pertinent books, papers and documents before a hearing committee, after formal disciplinary proceedings are instituted. Writs of subpoena shall be issued in blank by the clerk of this Court upon applicaion by any member of a hearing committee, Counsel or the respondent. The circuit court of any circuit in which a subpoena is issued or served or in which the attendance or production is required may, upon proper application, enforce the attendance and testimony of any witness and the production of any documents so subpoenaed. Subpoena and witness fees and mileage shall be the same as in criminal cases in the circuit courts.

There shall be no discovery proceedings except upon the order of the Chairman of the Board for good cause shown but subject, however, to HRCP Rule 26(c).

At the discretion of the hearing committee, a conference may be ordered for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Said conference may be held before the chairman of the committee or any member of the committee designated by its chairman.

16.13 *Attorneys Convicted of Crimes.*

(a) Upon the filing with this court of a certificate of a clerk of court demonstrating that an attorney has been convicted (certificate of conviction) of a crime which is, or if it had been committed in Hawaii would have been, a felony or which involves dishonesty or false statement, this court shall enter an order immediately restraining the attorney from engaging in the practice of law, whether the conviction resulted from a plea of guilty or nolo contendere

or from a verdict after trial or otherwise and regardless of the pendency of an appeal, pending final disposition of a disciplinary proceeding to be commenced upon such conviction. Upon good cause shown, the court may set aside such order restraining the attorney from engaging in the practice of law when it appears to be in the interest of justice so to do. An order restraining an attorney from the practice of law shall not constitute a suspension of the attorney for the purposes of Rule 16.16 unless this court shall so order. Upon being informed that an attorney has been convicted of a crime above described, Counsel shall obtain a certificate of the conviction and file the same with the Board and with the clerk of this court.

(b) The final conviction of an attorney for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against him based upon the conviction. For purposes of this Rule, a judgment of conviction is deemed final when the availability of appeal has been exhausted and the time for filing a petition for certiorari in the United States Supreme Court on direct review of the judgment of conviction has elapsed and no petition has been filed, or if filed the petition has been denied or the judgment of conviction has been affirmed.

(c) Upon the receipt of a certificate of conviction of an attorney of a crime described in (a) above, whether or not the attorney shall be restrained from the practice of law, this court shall refer the matter to the Board for the institution of a formal proceeding in which the sole issue to be determined shall be the extent of the discipline to be imposed, provided that a disciplinary proceeding so instituted shall not be brought to hearing until the judgment of conviction is final, unless the respondent shall so request.

(d) Immediately upon the filing with this court of a certificate demonstrating that the underlying conviction for a crime has been reversed, any order entered under the provisions of (a) above restraining the attorney from

the practice of law shall be vacated, any formal proceeding then pending against the attorney founded solely upon such conviction shall be terminated and any discipline imposed in any such formal proceeding shall be vacated, but the reversal of the conviction shall not terminate or affect any formal proceeding previously or thereafter instituted founded upon alleged misconduct by the attorney, whether or not involving the same facts alleged to constitute the crime or offense of which the attorney was convicted.

16.14 *Disbarment by Consent of Attorneys Under Disciplinary Investigation or Prosecution.*

(a) An attorney who is the subject of an investigation into, or a pending proceeding involving, allegations of grounds for his discipline may consent to disbarment, but only by delivering to the Board an affidavit stating that he desires to consent to disbarment and that:

(1) his consent is freely and voluntarily rendered; he is not being subjected to coercion or duress; he is fully aware of the implications of submitting his consent;

(2) he is aware that there is a presently pending investigation into, or proceeding involving, allegations that there exist grounds for his discipline the nature of which he shall specifically set forth;

(3) he acknowledges that the material facts so alleged are true; and

(4) he submits his consent because he knows that if charges were predicated upon the matters under investigation, or if the proceeding were prosecuted, he could not successfully defend himself.

(b) Upon receipt of the required affidavit, the Board shall file it with this court and this court shall enter an order disbarring the attorney on consent.

(c) The order disbarring the attorney on consent shall be a matter of public record. However, the affidavit required under the provisions of (a) above shall not be publicly disclosed or made available for use in any other proceeding except upon order of this court.

16.15 *Reciprocal Discipline.*

(a) All attorneys subject to the provisions of this Rule shall, upon being subjected to professional disciplinary action in another jurisdiction, promptly inform Counsel of such action. Upon being informed that an attorney subject to the provisions of these Rules has been subjected to discipline in another jurisdiction, Counsel shall obtain a certified copy of such disciplinary order and file the same with the Board and with this court.

(b) Upon receipt of a certified copy of an order demonstrating that an attorney admitted to practice in this State has been disciplined in another jurisdiction, this court shall forthwith issue a notice directed to the attorney containing: (1) a copy of said order from the other jurisdiction; and (2) an order directing that the attorney inform the court, within 30 days from service of the notice, of any claim by the attorney that the imposition of the identical discipline in this State would be unwarranted and the reasons therefor.

(c) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of (b) above, this court shall impose the identical discipline unless Counsel or the attorney demonstrates, or this court finds that upon the face of the record upon which the discipline is predicated it clearly appears, (1) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or (2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the court could not, consistent with its duty, accept as final the conclusion on that

subject; or (3) that the misconduct established warrants substantially different discipline in this State. Where this court determines that any of said elements exist, this court shall enter such other order as it deems appropriate.

(d) In all other respects, a final adjudication in another jurisdiction that an attorney has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in this State.

16.16 *Disbarred or Suspended Attorneys.*

(a) A disbarred or suspended attorney shall promptly notify by registered or certified mail, return receipt requested, all clients being represented in pending matters, other than litigation or administrative proceedings, of his disbarment or suspension and his consequent inability to act as an attorney after the effective date of his disbarment or suspension and shall advise said clients to seek legal advice elsewhere.

(b) A disbarred or suspended attorney shall promptly notify, or cause to be notified, by registered or certified mail, return receipt requested, each of his clients who is involved in pending litigation or administrative proceedings, and the attorney or attorneys for each adverse party in such matter or proceeding, of his disbarment or suspension and consequent inability to act as an attorney after the effective date of his disbarment or suspension. The notice to be given to the client shall advise the client of the desirability of the prompt substitution of another attorney or attorneys in his place.

In the event the client does not obtain substitute counsel before the effective date of the disbarment or suspension, it shall be the responsibility of the disbarred or suspended attorney to move in the court or agency in which the proceeding is pending for leave to withdraw.

The notice to be given to the attorney or attorneys for an adverse party shall state the place of residence of the client of the disbarred or suspended attorney.

(c) Orders imposing suspension or disbarment shall be effective 30 days after entry. The disbarred or suspended attorney, after entry of the disbarment or suspension order, shall not accept any new retainer or engage as attorney for another in any case or legal matter of any nature. However, during the period from the entry date of the order and its effective date he may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

(d) Within ten days after the effective date of the disbarment or suspension order, the disbarred or suspended attorney shall file with this court an affidavit showing: (1) that he has fully complied with the provisions of the order and with these Rules; (2) all other state, federal and administrative jurisdictions to which he is admitted to practice; and (3) that he has served a copy of such affidavit upon Counsel. Such affidavit shall also set forth the residence or other address of the disbarred or suspended attorney where communications may thereafter be directed to him.

(e) The Board shall cause a notice of the suspension or disbarment to be published in a newspaper of general circulation in the judicial circuit in which the disciplined attorney maintained his practice.

(f) The Board shall promptly transmit a certified copy of the order of suspension or disbarment to all judges of the State of Hawaii, and the administrative judge of each judicial circuit shall make such further order as he deems necessary to fully protect the rights of the clients of the suspended or disbarred attorney.

(g) A disbarred or suspended attorney shall keep and maintain records of the various steps taken by him under these Rules so that, upon any subsequent proceeding instituted by or against him, proof of compliance with these Rules and with the disbarment or suspension order will be

available. Proof of compliance with these Rules shall be a condition precedent to any petition for reinstatement.

16.17 *Reinstatement.*

(a) No suspended or disbarred attorney may resume practice until reinstated by order of this court except as provided in Rule 16.18.

(b) A person who has been disbarred after hearing or by consent may not apply for reinstatement until the expiration of at least two years from the effective date of the disbarment. An attorney suspended from practice may not apply for reinstatement until the expiration of at least one half of the period of suspension.

(c) Petitions for reinstatement by a disbarred or suspended attorney shall be filed with the Board and served upon Counsel. Upon receipt of the petition the Board shall refer the petition to a hearing committee. The hearing committee shall promptly schedule a hearing at which the petitioner shall have the burden of demonstrating that he is qualified to practice law in this State and worthy of the court's trust and confidence. At the conclusion of the hearing, the hearing committee shall promptly submit to the Board a report containing its findings and recommendations, together with the record of the proceedings before it. The Board shall review the report of the hearing committee and the record and shall submit a report containing its findings and recommendations, together with the record, to this court, which shall promptly enter an appropriate order.

(d) This court shall direct that the necessary expenses incurred in the investigation and processing of a petition for reinstatement be paid by the petitioner.

16.18 *Periodic Assessment of Attorneys.*

(a) Every attorney admitted to practice before this court shall pay to the clerk of this court an annual fee for

each fiscal year beginning July 1 to be set by the court from time to time which shall be administered and used by this court to defray the costs of disciplinary administration and enforcement under these Rules. The annual fee until further order of the court shall be:

After Date of Admission to Practice Law	Annual Fee
First Year, or portion thereof	$10.00
Second Year	20.00
Third Year	30.00
Fourth Year	40.00
Fifth Year	45.00
Sixth Year	50.00
Seventh Year	55.00
Eighth Year	60.00
Ninth Year and thereafter	65.00

(b) Full-time judges shall be exempt from the payment of such fee for such time as they serve in office.

(c) Any attorney who fails to pay the fee required under (a) above shall be summarily suspended, provided a notice of delinquency has been forwarded to him by certified mail addressed to his last known business address at least 30 days prior to such suspension.

(d) Any attorney suspended under the provisions of (c) above shall be reinstated without further order upon payment of all arrears and a penalty of 20% of the amount due from the date of his last payment to the date of his request for reinstatement.

(e) To facilitate the collection of the annual fee provided for in (a) above, all persons required by this Rule to pay an annual fee shall, on or before July 15 of every year, commencing 1974, file with the clerk of this court a registration statement, on a form prescribed by this court, setting forth his current residence and office ad-

dresses and such other information as this court may from time to time direct. In addition to such statement, every attorney shall file with the clerk of this court a supplemental statement of any change in the information previously submitted within 30 days of such change. All persons first becoming subject to these Rules by admission to the practice of law before the courts of this State after July 1, 1974, shall file the statement required by this Rule at the time of admission; such admittee will pay for the year of admission the annual fee provided in subsection (a).

(f) Within 30 days of the receipt of a statement or supplement thereto filed by an attorney in accordance with the provisions of (e) above, the clerk of this court shall acknowledge receipt thereof, on a form prescribed by this court, in order to enable the attorney on request to demonstrate compliance with the requirements of (a) and (e) above.

(g) Any attorney who fails to file the statement or supplement thereto in accordance with the requirements of (e) above shall be summarily suspended; provided a notice of failure to file the statement or supplement thereto has been forwarded to him by certified mail addressed to his last known business address at least 30 days prior to such suspension. He shall remain suspended until he shall have complied therewith, whereupon he shall be reinstated without further order.

(h) An attorney who has retired or is not engaged in practice shall advise the clerk of this court in writing that he desires to assume inactive status and discontinue the practice of law. Upon the filing of such notice, the attorney shall no longer be eligible to practice law. An attorney who is retired or on inactive status shall not be obligated to pay the annual fee imposed by this Rule upon active practitioners.

(i) Upon the filing of a notice to assume inactive status, an attorney shall be removed from the roll of those

classified as active until and unless he requests and is granted reinstatement to the active rolls. Reinstatement shall be granted, unless the attorney is subject to an outstanding order of suspension or disbarment, upon the payment of any assessment in effect for the year the request is made and any arrears accumulated prior to transfer to inactive status.

16.19 *Proceedings Where an Attorney is Declared to be Incompetent or is Alleged to be Incapacitated.*

(a) Where an attorney has been judicially declared incompetent or involuntarily committed on the grounds of incompetency or disability, this court, upon proper proof of the fact, shall enter an order transferring such attorney to inactive status effective immediately and for an indefinite period until the further order of this court. A copy of such order shall be served upon such attorney, his guardian, and/or the director of the institution to which he has been committed in such manner as this court may direct.

(b) Whenever the Board shall petition this court to determine whether an attorney is incapacitated from continuing the practice of law by reason of mental infirmity or illess or because of the use of drugs or intoxicants, this court may take or direct such action as it deems necessary or proper to determine whether the attorney is so incapacitated, including the examination of the attorney by such qualified medical experts as this court shall designate. If, upon due consideration of the matter, this court concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order transferring him to inactive status on the ground of such disability for an indefinite period and until the further order of this court. Any pending disciplinary proceeding against an attorney shall be held in abeyance.

This court shall provide for such notice to the respondent-attorney of proceedings in the manner as it deems

proper and advisable and shall appoint an attorney to represent the respondent if he is without adequate representation.

(c) If, during the course of a disciplinary proceeding, the respondent contends that he is suffering from a disability by reason of mental or physical infirmity or illness, or because of the use of drugs or intoxicants, which makes it impossible for the respondent to defend himself adequately, this court thereupon shall enter an order immediately transferring the respondent to inactive status until a determination is made of the respondent's capacity to continue to practice law in a proceeding instituted in accordance with the provisions of (b) above.

If this court shall determine that the respondent is not incapacitated from practicing law, it shall take such action as it deems proper and advisable including a direction for the resumption of the disciplinary proceeding against the respondent.

(d) The Board shall cause a notice of transfer to inactive status to be published in a newspaper of general circulation in the judicial circuit in which the disabled attorney maintained his practice.

(e) The Board shall promptly transmit a certified copy of the order of transfer to inactive status to all judges of the State of Hawaii and shall request such action under the provisions of Rule 16.20 as may be indicated in order to protect the interests of the disabled attorney and his client.

(f) No attorney transferred to inactive status under the provisions of this Rule may resume active status until reinstated by order of this court. Any attorney transferred to inactive status under the provisions of this Rule shall be entitled to apply for reinstatement to active status once a year or at such shorter intervals as this court may direct in the order transferring the respondent to inactive

status or any modification thereof. Such application shall be granted by this court upon a showing that the attorney's disability has been removed and he is fit to resume the practice of law. Upon such application, this court may take or direct such action as it deems necessary or proper to a determination of whether the attorney's disability has been removed including a direction for an examination of the attorney by such qualified medical experts as this court shall designate. In its discretion, this court may direct that the expense of such examination shall be paid by the attorney.

Where an attorney has been transferred to inactive status by an order in accordance with the provisions of (a) above, and, thereafter, in proceedings duly taken, he has been judicially declared to be competent, this court may dispense with further evidence that his disabiliy has been removed and may direct his reinstatement to active status upon such terms as are deemed proper and advisable.

(g) The filing of an application for reinstatement to active status by an attorney transferred to inactive status because of disability shall be deemed to constitute a waiver of any doctor-patient privilege with respect to any treatment of the attorney during the period of his disability. The attorney shall be required to disclose the name of every psychiatrist, psychologist, physician and hospital or other institution by whom or in which the attorney has been examined or treated since his transfer to inactive status and he shall furnish to this court written consent to each to divulge such information and records as requested by court-appointed medical experts.

16.20 *Appointment of Counsel to Protect Clients' Interests When Attorney Disappears, Dies or is Transferred to Inactive Status Because of Disability.*

(a) Whenever an attorney has been transferred to inactive status because of incapacity or disability, or dis-

appears or dies, and no partner, executor or other responsible party capable of conducting the attorney's affairs is known to exist, the circuit court of any circuit in which such attorney maintained an office, upon proper proof of the fact, shall appoint an attorney or attorneys to inventory the files of the inactive, disappeared, or deceased attorney and to take such action as seems indicated to protect the interests of the inactive, disappeared or deceased attorney and his clients.

(b) Any attorney so appointed shall not be permitted to disclose any information contained in any files so inventoried without the consent of the client to whom such file relates except as necessary to carry out the order of the court which appointed the attorney to make such inventory.

16.21 *Expenses.* The salaries of Counsel and staff, their expenses, administrative costs, and the expenses of the members of the Board and of hearing committees shall be determined by the court and be paid by the clerk of this court or as further directed by this court out of the funds collected under the provisions of Rule 16.18. The Board shall make recommendations to the court relative to said salaries, expenses and administrative costs and other pertinent matters.

16.22 *Confidentiality.* All proceedings involving allegations of misconduct by or disability of an attorney shall be kept confidential until and unless this court enters its order for the imposition of public discipline or the respondent requests that the matter be public or the investigation is predicated upon a conviction of the respondent for a crime or, in matters involving alleged disability, this court enters an order transferring the respondent to inactive status pursuant to Rule 16.19. This provision shall not be construed to deny access to relevant information to authorized agencies investigating the qualifications of judicial candidates, or to other jurisdictions investigating

qualifications for admission to practice or to law enforcement agencies investigating qualifications for government employment. All participants in the proceeding shall conduct themselves so as to maintain the confidentiality of the proceeding. In addition, the Board shall transmit notice of all public discipline imposed by the supreme court, or transfer to inactive status due to disability, to the National Discipline Data Bank maintained by the American Bar Association.

16.23 *Effective Date.* These Rules shall become effective on July 1, 1974, and any disciplinary investigation pending on that date shall be transferred to the Board, provided that any case then pending with respect to which a formal hearing has been commenced shall be concluded under the procedure existing prior to the effective date of these Rules.

DATED: Honolulu, Hawaii, December 27, 1973.

(SEAL)

/s/ WILLIAM R. RICHARDSON

/s/ THOS. MARUMOTO

/s/ KAZULISAN ABE

/s/ BERNARD H. LEVINSON

/s/ BERT T. KOBAYASHI

FILED
APR 30 1974

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-1450

In the Matter of RALPH E. COREY, *Petitioner*

BRIEF FOR RESPONDENT STATE OF HAWAII

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No. 73-1450

In the Matter of RALPH E. COREY, *Petitioner*

BRIEF FOR RESPONDENT STATE OF HAWAII

OPINION BELOW

The opinion of the Supreme Court of Hawaii is reported at 54 Haw ....., 515 P.2d 400 (1973).

JURISDICTION

The jurisdiction requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

A. Did the Petitioner receive a fair notice of the charges against him when he was served with an order

to show cause why he should not be disciplined on the basis of the record in a prior civil case in which a jury found him guilty of fraud, and further was served with a detailed specification of the portions of that record which evidenced his fraudulent conduct?

B. Was Petitioner's constitutional right to confrontation violated by the admission in the disciplinary proceeding of portions of the prior civil record evidencing his fraudulent conduct when (a) in the prior proceeding he fully exercised his right to cross-examine; and (b) in the disciplinary proceeding he was afforded an opportunity to call the same or additional witnesses and elected not to do so?

C. Was Petitioner denied his right to an impartial tribunal because the Justices of the Supreme Court of Hawaii were familiar with his difficulties as a result of their review of the prior fraud litigation when there was no showing of bias which was extrajudicial or personal?

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part:

> "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, . . ."

The Fourteenth Amendment provides in relevant part:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

A. The Petitioner's Fraud

In November 1963, Petitioner, a Hawaii attorney and an officer and principal shareholder of Kauaian Development Co., Inc., approached State Savings and Loan Association in order to secure a loan to enable Kauaian Development to construct a hotel condominium project. (R. 80-82)

In connection with the loan application, Petitioner represented that the cost of constructing the improvements was a contruction contract in the amount of $761,000.00 plus $60,000.00 for certain extra items. *(Ibid.)*

This figure was relied on by State Savings in making a loan of $857,000.00 in accordance with a commitment to lend an amount not exceeding 65% of the appraised value of the completed project or 65% of the appraised value of the land plus construction costs, whichever was less. *(Ibid.)*

Although Petitioner represented through his direct action that the construction cost was $761,000.00 plus, in reality the actual construction contract was $600,000.00 plus $60,000.00 worth of apartments. (R. 83-84)

The contract for $761,000.00 plus was not for the purpose of actual construction but was executed "for

financing purposes only." Petitioner, fully aware of this, nonetheless made the fraudulent representation in order to obtain a larger construction loan than would have otherwise been possible. (R. 84-85)

Sometime after the loan was made, Kauaian Development defaulted and in 1966 State Savings instituted a mortgage foreclosure suit. (R. 94) During the trial of that action State Savings learned for the first time the true amount of the construction contract. It accordingly instituted a civil fraud action against Petitioner and two of his associates. (R. 99-100) At a trial of that action in 1969, a jury awarded State Savings $109,694.10 against Petitioner and one of his associates on the fraud count. This amount represented the difference between the unpaid balance of the loan and the amount paid by State Savings for the property at a court-ordered auction. The trial court ordered a new trial on the issue of damages under the fraud count but, before the new trial, appeals and cross-appeals were taken and the Supreme Court of Hawaii reinstated the jury's verdict, noting that Petitioner's conduct in the case raised serious questions of impropriety.[1]

After discovery of Petitioner's fraud, the Vice President of State Savings and its attorney filed complaints with the Supreme Court of Hawaii which were duly referred to the Rule 16 Commission of the Hawaii Bar Association. (R. 100-101; 104-106) When the Commission for various reasons had failed to proceed

[1] *State Savings & Loan v. Corey*, 53 Haw. 132, 488 P.2d 703 (1971), cert. denied. 406 U.S. 920 (1972).

by the time of the Court's decision in the *State Savings* case, it recommended that under the circumstances the Court should proceed with appropriate disciplinary proceedings on its own motion. (R. 113-114)

B. The Disciplinary Proceeding

On August 29, 1972, the Supreme Court of Hawaii issued and caused to be served on Petitioner an order to show cause directing Petitioner to file a written statement on or before October 2, 1972, showing cause why he should not be censured, suspended, or disbarred on the basis of the record in the *State Savings* case. The Attorney General of Hawaii was requested to appear in the proceedings as amicus curiae. (R. 1-2)

Petitioner failed to file a response on October 2, 1972, and instead filed a "Suggestion of Disqualification" and a request for a stay. (R. 6-8)

In response to Petitioner's request for a stay, the Court extended the time to file the written statement until October 10, 1972. (R. 17-18) On that date Petitioner filed a response which raised various legal defenses and denied the allegation that he had defrauded State Savings. (R. 40-49)

A preliminary hearing was held by the Court on November 15, 1972. (R. 71)

As a result of that hearing the Supreme Court of Hawaii ordered that it would consider relevant portions of the *State Savings* case and further ordered as follows:

"6. The Attorney General, or his deputy appearing in this matter, shall, on or before December 15, 1972, serve upon the Respondent's attorney and file with the clerk of this court a specification of such portions of the transcript and exhibits in *State Savings and Loan Association v. Corey and Kimbrough, No. 5021,* as, in his opinion, would support action by this court in censuring, suspending or disbarring Respondent, together with a Memorandum of Law in support of such opinion.

"7. Respondent shall, on or before February 1, 1973 serve upon the Attorney General and file with the clerk of this court a specification of such portions of the transcript and exhibits in *State Savings and Loan Association v. Corey and Kimbrough, No. 5021,* as, in his opinion, indicate that this court should not censure, suspend or disbar Respondent, *together with such offer of proof as Respondent may wish to make in additional support of Respondent's position,* together with a memorandum of law in support of Respondent's opinion, it being understood that the Attorney General or his deputy shall have the burden of proof in justifying disciplinary action against Respondent." (R. 77-78) (Emphasis added.)

In response to said order, on December 15, 1972, the Attorney General filed a detailed specification of those portions of the *State Savings* record which evidenced Petitioner's fraud. (R. 79-89)

On April 16, 1973, four months after he was served with a copy of the Attorney General's specifications, Petitioner filed his response thereto. (R. 158) He spe-

cified portions of the *State Savings* record which he asserted supported his position but made no offer of proof whatsoever with respect to any additional evidence which he believed supported his position. (R. 158-514)

The Petitioner having filed no offer of proof, the matter was set for oral argument on October 4, 1973. (R. 517) On October 19, 1973, the Supreme Court of Hawaii issued its opinion finding Petitioner guilty of fraud and suspending his license to practice law for six months. (R. 525-534)

ARGUMENT

A. PETITIONER WAS AFFORDED A FULL AND FAIR NOTICE OF THE CHARGE AGAINST HIM

Petitioner's initial argument for granting the writ is that the Supreme Court of Hawaii did not afford him notice as to (a) what conduct was the focus of the disciplinary proceeding; and (b) what standard his conduct was to be measured by. This he contends is contrary to *In re Ruffalo,* 390 U.S. 544 (1968).

Petitioner plainly was afforded the notice required by *Ruffalo.*

He was served with an Order to Show Cause why he should not be disciplined on the basis of the record in *State Savings & Loan Association v. Corey and Kimbrough, No. 5021,* a proceeding in which a jury found him guilty of civil fraud.

The entire focus of that case, as far as Petitioner was concerned was whether he had defrauded a savings and loan institution by intentionally misrepresenting the cost of construction of a hotel-condominium in order to obtain a larger construction loan than would otherwise have been possible. The precise conduct by which Petitioner perpetrated the fraud is set forth in the *State Savings* record.

In addition, prior to his opportunity to offer evidence before the Supreme Court of Hawaii, Petitioner was served with a detailed specification of those portions of the *State Savings* record which evidenced his fraudulent conduct. (R. 79-86)

It is simply absurd to suggest as Petitioner does that he was not apprised of what conduct on his part was the subject of the inquiry. The reference to the record and subsequent specifications by the Attorney General fully apprised Petitioner of the conduct in question and provided him the fair notice of the charge required by *Ruffalo.*

Further, this case plainly does not involve the constitutional infirmities which required reversal in *Ruffalo.* There the attorney had been charged with soliciting Federal Employers' Liability Act plaintiffs through an agent, one Orlando, who was a railroad employee. At the hearing the attorney and Orlando testified that Orlando merely investigated rather than solicited cases. Thereafter the charge was amended to allege that the attorney hired Orlando to investigate Orlando's own employer. This Court held that the proceedings became a trap when after they were under-

way the charges were amended based on the testimony of the accused.

Here there was no amendment of the charges. Petitioner knew from the outset that he was accused of defrauding the savings and loan institution. And this conduct was the basis for his suspension.

Ruffalo does not hold as Petitioner states that procedural due process requires that he be notified prior to the proceeding of any specific cannon violated by his fraudulent conduct. And Petitioner has cited no other authority for that proposition. Indeed, it is the rule in Hawaii as in many other jurisdictions that to hold an attorney answerable for unprofessional conduct it is unnecessary that his offense be spelled out in some particular provision of a code of ethics or statute. *In re Trask,* 46 Haw. 404, 380 P.2d 751 (1963); *In re McBride,* 164 Ohio St. 419, 132 N.E.2d 113 (1956); cert. den. 351 U.S. 965; *In re Cox,* 164 Kan. 160, 188 P.2d 652 (1948); *State Bar of Michigan v. Hartford,* 282 Mich. 124, 275 N.W. 791 (1937). This Court has long held that any conduct on the part of an attorney which evidences his unfitness and character as an attorney is grounds for discipline. *Ex parte Wall,* 107 U.S. 265 (1882); *Selling v. Radford,* 243 U.S. 46 (1917).

Moreover, here Petitioner was specifically informed, prior to his opportunity to submit evidence, that conduct amounting to fraud necessarily reflected on his professional character. Indeed, he was put on notice that under the law of Hawaii no specific provision of

the canons or elsewhere need be pointed to. (R. 88-89)

Petitioner was not prejudiced when the Hawaii Supreme Court later noted in its opinion that fraudulent conduct such as Petitioner's violated a number of ethical canons. He obviously had no legal defense which notice of those canons would have enabled him to make. Petitioner does not contend that fraud doesn't constitute professional misconduct. The canons mentioned by the Court do not contain any different or specific standards by which his conduct was measured. This is not a criminal case where notice of the specific statute is necessary in order for the defendant to be apprised of each specific element of the crime and of any defenses of it. The canons are intended as a guide to professionals. They set forth standards of conduct only in the most general terms. The preamble to the canons Petitioner violated provides:

> "No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of others equally imperative, though not specifically mentioned."

Here Petitioner was afforded a full and detailed notice of the fraudulent conduct which constituted the basis of the Court's action. He was further informed that such fraudulent conduct was grounds for disci-

plinary action. This certainly satisfied the requirements of procedural due process.

B. PETITIONER WAS AFFORDED AN OPPORTUNITY TO CONFRONT HIS ACCUSERS AND CHOSE NOT TO DO SO

Petitioner next complains that the Supreme Court of Hawaii denied him any opportunity to examine Brown (an officer of the savings and loan institution), Campbell (the attorney for the savings and loan institution), and Young (his codefendant in the civil fraud trial). This Petitioner says denied him his right to procedural due process, including his rights under the Confrontation Clause.

This simply mistates the record.

The Supreme Court of Hawaii, after preliminarily ruling that portions of the *State Savings* record which were relevant to the question of Petitioner's fraud could be admitted in the disciplinary proceeding, apprised Petitioner that he could submit:

> ". . . such offer of proof as Respondent may wish to make in additional support of Respondent's position, . . . it being understood that the Attorney General or his deputy shall have the burden of proof in justifying disciplinary action against the Respondent." (R. 77-78)

The Supreme Court of Hawaii made it clear that the record in the *State Savings* case was admissible but that Petitioner could offer such further proof which he believed supported his position.

Petitioner never made any such offer. The case remained a paper case because Petitioner chose that it remain so. The inference which can be drawn from Petitioner's choice is inescapable. He did not believe he would benefit from further litigation of the facts surrounding his fraud.

If Petitioner had such a burning desire to attack Brown's assurance that he relied on Petitioner's misrepresentations or to challenge the testimony of his former co-defendant Young, why didn't he at least make an offer of proof in this regard. He may not now complain that he was denied a right which he deliberately chose not to exercise.

Even if this were a criminal case, the admission of the *State Savings* record by the Supreme Court of Hawaii would not violate Petitioner's rights under the Confrontation Clause under the standards announced by this Court in *California v. Green,* 399 U.S. 149 (1970). There this Court held that (1) the Confrontation Clause is not violated by the admission of a declarant's out-of-court statements as long as he is subject to full cross-examination at the trial; and (2) the Confrontation Clause is not violated, even in the absence of an opportunity for cross-examination at trial, if in the earlier proceeding the defendant had the opportunity to cross-examine.

Here, of course, Petitioner had and extensively exercised his right to cross-examine the witnesses in the *State Savings* case. In addition, he had the opportunity to examine them again in the disciplinary proceeding and elected not to do so. Either circumstance

would be sufficient to satisfy the requirements of *Green.*

And, of course, the admission of the testimony adduced in the civil fraud trial in the subsequent disciplinary proceeding was in accord with the evidentiary rule adopted by most jurisdictions which have considered the question. *People v. Howard,* 364 P.2d 380 (Colo. 1961), cert. den. 369 U.S. 819; *Louisiana State Bar Ass'n v. Sackett,* 231 La. 655, 92 So.2d 571 (1957); *In re Santosuosso,* 318 Mass. 489, 62 N.E.2d 105 (1945); *In re Lacy,* 234 Mo. App. 71, 112 S.W.2d 594 (1937).

Subsequent to the *Howard* case, the Tenth Circuit Court of Appeals, in affirming the District Court's disbarment of Howard based on the state proceedings, said:

> "Howard insists that the state proceedings denied him due process and the right of confrontation by the receipt of the records in the civil cases against him. This point was presented to the Colorado Supreme Court which upheld the use of the records. Recognizing that the state decisions are split on this issue, we find no denial of any constitutional rights. Howard was a party to the two civil cases and had full opportunity to examine and cross-examine the witnesses." *(Howard v. United States District Court for the District of Colorado,* 318 F.2d 521, 523 (10th Cir. 1963).

Hawaii did not adopt a "no testimony will be adduced" rule as Petitioner alleges. (Op. Br., p. 24) He had the opportunity to and in fact did cross-examine at length in the prior civil trial. He further had

the opporunity to call the same or additional witnesses in the disciplinary proceeding. His constitutional right to confrontation was not abridged.

C. PETITIONER WAS NOT DENIED HIS RIGHT TO AN IMPARTIAL TRIBUNAL

Petitioner's final argument is the most strained. He asserts that because the Justices of the Hawaii Supreme Court had previously reviewed the civil fraud case and had stated that his conduct there raised serious questions of impropriety, due process required that they excuse themselves in the disciplinary proceeding.

This misstates the law.

It is well established that even in a criminal action a judge is not disqualified by virtue of a former decision or expression in an earlier civil or criminal litigation involving related facts. *United States v. Dichiarinte,* 445 F.2d 126 (7th Cir. 1971); *United States v. Bolden,* 355 F.2d 453 (7th Cir. 1965); see, Annotation, *Disqualification of Judge For Having Decided Different Case Against Litigant,* 21 ALR 3d 1369 (1968).

Alleged bias and prejudice to be disqualifying must stem from an extrajudicial or personal source. *United States v. Grinnell Corp.,* 384 U.S. 563 (1966).

As the Court said in *United States v. Valenti,* 120 F.Supp. 76, 85 (E.D. N.Y. 1954):

> "The interdiction of the law is not the mere possession of definite views regarding the law, or the

> conduct of a party, or even a 'prejudgment' of the matters in controversy, but rather an attitude of personal enmity towards the party affiant, or in favor of the adverse party to the detriment of the former."

Here there is no indication whatever that any of the Justices harbored personal or extrajudicial bias toward the Petitioner. Their knowledge of his fraudulent conduct was extensive but it was acquired in the regular exercise of their judicial functions when they reviewed the *State Savings* record. Petitioner was a party to and vigorously defended that action. The Justices' familiarity with his difficulties was not extra-judicial.

Petitioner, however, makes much of an alleged ex parte surreptitious campaign to influence the Court. He indicates this campaign was successful because the Court failed to refer the charges to the Bar Association's Rule 16 Commission.

Again Petitioner misstates the record.

The so-called surreptitious campaign, insofar as Petitioner's fraud was concerned, consisted of a letter written to the Court by Mr. Brown, the victim of the fraud, on March 17, 1967. This was immediately referred to the appropriate committee of the Bar Association. (R. 100-101) The charge as set forth in Brown's letter was amended in a letter to the Court by Mr. Campbell, attorney for State Savings, written on October 11, 1969. (R. 104) This and a subsequent letter by Brown were also referred by the Court to the Bar Association's committee. (R. 104-106) Peti-

tioner was informed of the charges on October 22, 1969, prior to any action by the committee. (R. 106) Indeed, he Bar Association never took action. After numerous delays due to an inability to obtain attorneys to serve on the committee of inquiry, and in view of the fact that by that time the Court had reviewed the *State Savings* case, the Commission, on October 21, 1971, formally recommended to the Court that it proceed without awaiting a report from the Commission. (R. 113-114) The Court followed this recommendation.[2]

In short, the alleged "surreptitious campaign" consisted of nothing more than complaints to the Court by the victims of Petitioner's fraud. These were referred to the Rule 16 Commission in accordance with the Court's usual procedure. When the Rule 16 Commission had been unable to proceed by the time of the *State Savings* decision, it recommended that under the circumstances the Court should proceed independently. The Court thus had good reasons not to follow the normal procedures. It elected to do so, and acted solely on the basis of evidence, in the form of the *State Savings* record, adduced in the disciplinary proceeding. That evidence overwhelmingly supports the

---

[2]Under the law of Hawaii, the Supreme Court is not bound to the Rule 16 procedure and may proceed on its own initiative and prescribe such procedure as it deems appropriate, subject only to the requirements of due process. *In re Trask*, 46 Haw. 404 (1963). Moreover, Rule 16(d) of its Rules then provided:

> "(d) *Limitations.* The jurisdiction of this court and the other courts of the State of Hawaii to grant appropriate relief in causes involving professional misconduct or unauthorized practice of law shall not be deemed to be limited, restricted or abrogated by anything contained in this rule."

charges against Petitioner. The record simply contains no basis for Petitioner's assertion that the well had been poisoned.

D. THE CASE IS UNIMPORTANT AND HAS LITTLE PRECEDENTIAL VALUE

Petitioner fails to offer any reasons for granting the writ other than his contention that the decision is wrong.

There are no such reasons. The imposition of a six-month suspension may be important to Petitioner, but it does not amount to a permanent loss of livelihood and is not so severe as to warrant the time and attention of this Court.

More importantly, this case quite obviously turns on its individual facts. The procedure followed by the Supreme Court of Hawaii was necessitated by the unique circumstances of this case. The Bar Association's Rule 16 Commission after a long delay had been unable to act and had specifically recommended that the Court proceed independently of Rule 16. Further, the Court in exercising its judicial functions had already become familiar with Petitioner's fraudulent conduct. Accordingly, it acted under its inherent power to regulate the conduct of attorneys. This was in accord with Rule 16(d) of its rules then in effect which provided that nothing in the rule limited the inherent power to grant appropriate relief in cases of professional misconduct. That rule has since been amended. See Appendix E to the Petition. It is cer-

tainly unlikely that this procedure would be followed in future cases.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated, Honolulu, Hawaii,
April 23, 1974.

Respectfully submitted,

GEORGE PAI,
Attorney General, State of Hawaii,
E. JOHN MCCONNELL, JR.,
NOBUKI KAMIDA,
Deputy Attorneys General,
Attorneys for Respondent
State of Hawaii.

(Appendices Follow)

Appendix A

In the Supreme Court of the State of Hawaii
October Term 1973

In the Matter of Ralph E. Corey,
Attorney at Law

No. 5344

[Filed October 19, 1973]

RICHARDSON, C.J., ABE, LEVINSON and KOBAYASHI, JJ., and CIRCUIT JUDGE VITOUSEK in place of MARUMOTO, J., Recused

Attorney and Client—jurisdiction of courts.

The supreme court has authority over matters concerning disciplinary action of members of the bar.

Same—character and conduct.

Active participation in fraud or even silence of an attorney where he has knowledge of the current perpetration of a fraud by his client upon another is professional misconduct which merits disciplinary action by the court.

Same—same.

An attorney engaged in practice of law is held to the same highest standards of ethical and moral

uprightness and fair dealing when acting as a businessman or when acting as a lawyer and is subject to disciplinary action if he fails to maintain those standards in either capacity.

Same—same.

While commercial activities are not forbidden a lawyer, he must see that his dealings as a businessman are as upright as should be his dealings in his professional capacity.

Per Curiam. This is an original proceeding initiated by this court on an order to show cause issued by this court ordering respondent Ralph E. Corey, Esq., to file a written statement showing cause why he should not be censured, suspended, or disbarred from all the courts of the State of Hawaii based on the record of the case entitled *State Savings and Loan Association v. Ralph E. Corey and Robert M. Kimbrough and Wallace C. S. Young,* No. 5021. The attorney general of the State of Hawaii was requested, personally or through a deputy, to appear in the proceeding as amicus curiae.

By order of this court filed November 16, 1972, this court ordered, *inter alia,* as follows:

a. Respondent's request for permission to inspect the records and files of the Supreme Court Rule 16(c) Commission relating to this matter is granted;

b. The attorney general, or his deputy appearing in this matter, shall serve upon the respond-

ent's attorney and file with the clerk of this court a specification of such portions of the transcript and exhibits in said State Savings case, No. 5021, as, in his opinion, would support action by this court in censuring, suspending or disbarring respondent, together with a memorandum of law in support of such opinion;

c. Respondent shall serve upon the attorney general and file with the clerk of this court a specification of such portions of the transcript and exhibits in said State Savings case, No. 5021, as, in his opinion, indicate that this court should not censure, suspend or disbar respondent, *together with such offer of proof as respondent may wish to make in additional support of respondent's position,* together with a memorandum of law in support of respondent's opinion, *it being understood that the attorney general or his deputy shall have the burden* of proof in justifying disciplinary action against the respondent. (Emphasis added.)

The specifications and memoranda of law were filed by the attorney general and the respondent. However, though given the opportunity, the respondent failed to file any offer of proof which would additionally support respondent's position herein.

This court has jurisdiction over matters concerning disciplinary action of members of the bar. HRS § 605-1, as amended by Act 184, sec. 1(a), S.L.H. 1972.

After a thorough and complete review of the record of said case we are of the opinion that respondent is guilty of misrepresentation amounting to fraud and thus as an attorney is guilty of professional misconduct. The record of said case shows that respondent, who was a substantial shareholder, a corporate officer (vice president) and corporate attorney of Kauaian Development Company, a corporation, committed said misrepresentation in his effort to obtain for said corporation a mortgage loan from State Savings and Loan Association for the construction of a hotel-condominium.

A brief summary of the facts herein is as follows:

Respondent, as attorney and corporate officer, was fully aware of the fact that there were two construction contracts:

1. Construction contract dated October 28, 1963, stating in pertinent parts as follows:

> WITNESSETH, that the Contractor [Better Built Hawaii, Ltd.] and the Owner [Kauaian Development Company, Inc.] for the considerations hereinafter named agree as follows:
>
> . . . .
>
> The Contractor shall furnish all of the materials and perform all of the work shown on the Drawings and described in the Specifications entitled "The Kauaian Hyatt House" prepared by . . ., acting as and in these Contract Documents entitled the Architect; and shall do everything required by this Agreement, the General Conditions of the Contract, the Specifications and the Drawings.
>
> . . . .

> The Owner shall pay the Contractor for the performance of the Contract, subject to additions and deductions provided therein, in current funds as follows: SEVEN HUNDRED SIXTY-ONE THOUSAND FIVE HUNDRED AND NO/100 DOLLARS ($761,500.00). THE OWNER SHALL HAVE THE OPTION TO PAY THE CONTRACTOR AN ALTERNATE CONTRACT AMOUNT OF: COST PLUS 7%, COST BEING DETERMINED BY STANDARD A.I.A. ACCOUNTING PROCEDURE.

2. Construction Contract dated November 8, 1963, executed by and between Better Built Hawaii, Ltd., as contractor, and Kauaian Development Company, Inc., as owner, stating as follows:

> It is agreed between Better Built Hawaii, Inc. and Kauaian Development Company, Inc. that a new cost figure has been reached relative to the Kauaian Hyatt House and subject price is now $600,000 total cost for all contractual work, including rock wall and fill and pier facilities. In addition, an agreement is reached whereby any savings under $600,000 will be divided equally between Better Built Hawaii, Inc. and Kauaian Development Company, Inc. In addition, Mr. Emil A. Offer, and/or Better Built Hawaii, Inc. will receive $60,000 worth of apartments in the Kauaian Hyatt House upon completion of the contract.

The construction contract dated October 28, 1963, was not for the purpose of actual construction but was executed only for the purpose of obtaining construction financing from State Savings and Loan Association. However, State Savings and Loan Association was not informed that said construction contract was

for financing purpose only and not for actual construc
tion purposes and was led to believe that the said
contract was the actual construction contract. The
actual contract for construction purposes was the
contract dated November 8, 1963. Notwithstanding
the existence of the actual construction contract, re
spondent as said corporate attorney and corporate
officer represented to State Savings and Loan Asso
ciation that the cost of construction of the improve
ments was determined on the construction contract
referring to a maximum amount of $761,000.00, and
respondent failed to inform and/or cause to have the
said mortgagee informed that the actual construction
contract cost was $600,000.00 plus rather than prem
ised on the contract referring to the sum of
$761,000.00. Said representation by respondent was
by direct actions and also by way of acquiescence
through silence on the part of respondent during
various meetings held with the mortgagee in their
discussions, negotiations and consummation of the
mortgage loan.

The record of the present proceeding substantiates
the fact to be that the purpose of respondent in fail
ing to inform the mortgagee of the actual cost of
construction in the sum of $600,000.00 plus was to
acquire a larger mortgage loan than would have been
possible if the actual construction contract had been
used for the financing purposes. Mortgagee, not know
ing of the actual construction contract and relying on
respondent's representation that the cost of construc
tion was determined on the contract referring to the

sum of $761,000.00, did on January 17, 1964, grant the mortgage loan in question to respondent's corporation.

The conduct of the respondent was in violation of the following canons of ethics which were in effect when said misrepresentation occurred:[1]

> Canon 15—How Far A Lawyer May Go in Supporting A Client's Cause. . . . The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.
>
> Canon 16—Restraining Clients from Improprieties. A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, ... If a client persists in such wrongdoing the lawyer should terminate their relation.
>
> Canon 29—Upholding the Honor of the Profession. . . . He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.
>
> Canon 32—The Lawyer's Duty in Its Last Analysis. No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive, nor should any lawyer render any service or advice involving disloyalty to the law whose ministers

[1]Under Rule 16(a) of the Rules of the Supreme Court of Hawaii which were applicable at the time the misrepresentation occured in November-December, 1963, the canons of professional ethics as adopted by the American Bar Association were in effect and are applied here.

> we are, or disrespect of the judicial office, wh
> we are bound to uphold, or corruption of a
> person or persons exercising a public office
> private trust, or deception or betrayal of
> public. When rendering any such improper se
> ice or advice, the lawyer invites and merits st
> and just condemnation. . . .

In a case involving the participation of an attor in the fraudulent sale of a bakery, the New Y Supreme Court, Appellate Division, found the att ney ". . . guilty of professional misconduct by rea of his active participation in the fraud, his sile when he knew the buyer was being defrauded and violation of a fiduciary relationship as escrow hol of the moneys paid by the buyer", and disbarred hi *In re Sherman,* 65 N.Y.S.2d 802, 803, 271 A.D. (1946).

> It is well settled that an attorney engaged
> practice of law is held to the same "high
> standards of ethical and moral uprightness a
> fair dealing" when acting as a businessman
> when acting as a lawyer and is subject to d
> ciplinary action if he fails to maintain th
> standards in either capacity. *Marco v. Dul*
> 169 F.Supp. 622, 631 (S.D.N.Y. 1959).
>
> While commercial activities are not forbidde lawyer, he "must see that his dealings as a bu ness man are as upright as should be his deali in his professional capacity" . . . . *Matter Chartoff,* 116 A.D.2d 277, 280, 227 N.Y.S.2d 5 581 (1962).

The above stated principles regarding the conduct of an attorney either in his professional capacity or as a businessman are those for which we find Mr. Corey has shown a complete disregard.

The respondent has failed to show cause why he should not be censured, suspended or disbarred. Issues raised in this proceeding by respondent are without merit.

We therefore, based on the record herein, suspend his license to practice law before all the courts of the state of Hawaii for a period of six months effective thirty days after entry of judgment in this case by this court.

William S. Richardson

Kazuhisa Abe

Bernard H. Levinson

Bert T. Kobayashi

Betty M. Vitousek

Helen B. Ryan (Ryan and Ryan of counsel) for respondent.

E. John McConnell, Jr., Deputy Attorney General (George Pai, Attorney General, of counsel) for State of Hawaii, amicus curiae.

Appendix B

No. 5344

In the Supreme Court of the State of Hawaii
October Term 1973

In the Matter of
Ralph E. Corey,
Attorney at Law

[Filed Nov. 28, 1973]

JUDGMENT

George Pai 609,
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State of Hawaii,

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Honolulu, Hawaii 96813,
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Attorneys for State of Hawaii

No. 5344

In the Supreme Court of the State of Hawaii

October Term 1973

In the Matter of
Ralph E. Corey,
Attorney at Law

JUDGMENT

Pursuant to the opinions of the Supreme Court of the State of Hawaii filed in this original proceeding on October 19, 1973 and November 5, 1973;

It Is Hereby Ordered, Adjudged and Decreed, that the license of respondent Ralph E. Corey, Esq., to practice law before all the courts of the State of Hawaii be suspended for a period of six months;

It Is Hereby Further Ordered, Adjudged and Decreed, that such suspension shall be stayed on the following terms:

a) that respondent, without delay, initiate his contemplated petition for writ of certiorari or appeal to the Supreme Court of the United States and expeditiously complete his requirements for said petition or appeal;

b) that the stay granted herein shall remain in effect until the conclusion of the review of the judg-

ment of this court by the Supreme Court of
United States;

c) that, in the event the Supreme Court of
United States denies respondent's petition for a w
of certiorari or appeal or sustains the judgment
this Court in suspending respondent's license to pr
tice law, the said suspension shall become effect
thirty days from the date of said denial or order
the Supreme Court of the United States.

Dated: Honolulu, Hawaii, Nov. 28, 1973.

By the Court:
Clement J. H. Chun
Clerk

Approved:
(Seal) Bert T. Kobayashi
Justice

FILE COPY

MAY 8 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1450

IN THE MATTER OF RALPH E. COREY, *Petitioner*

PETITIONER'S REPLY MEMORANDUM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1450

IN THE MATTER OF RALPH E. COREY, *Petitioner*

PETITIONER'S REPLY MEMORANDUM

Respondent's brief in opposition underscores the importance of review by this Court of the decision of the Supreme Court of Hawaii suspending petitioner from the practice of law.

1. Petitioner contends that the Sixth Amendment's Confrontation Clause was violated when he was disciplined without opportunity to confront his accusers before the same tribunal which was to decide his fitness to practice law. In answer, we are told that he had adequate opportunity to cross-examine at least some of his accusers in a prior civil suit where the stakes were entirely different, and that in the later disciplinary proceeding he had an opportunity to submit an "offer of proof." Neither answer suffices.

First, it is well established in recent decisions by thi Court—decisions pointedly neither discussed nor cite by respondent—that an opportunity to cross-examin in a prior proceeding satisfies the requirements of th Confrontation Clause *only* when the previously exam ined witness is unavailable at the second proceedin through no fault of the State.[1] The Attorney Genera does not, and cannot, contend that in this case the wit nesses—Brown, Young and Campbell (who did no testify in the prior proceeding)—were "unavailable." Under such decisions as *California* v. *Green*, 399 U.S 149 (1970), *Barber* v. *Page*, 390 U.S. 719 (1968) an *Mancusi* v. *Stubbs*, 408 U.S. 204 (1972), the failur of the State to produce petitioner's accusers for exam ination in the same tribunal that was considering hi disbarment or suspension from practice deprived hin of his rights under the Confrontation Clause of th Sixth Amendment.

That petitioner had an opportunity in the discipli nary proceeding to make an "offer of proof" does no cure the court's failure to allow him to subject hi accusers to the harsh light of cross-examination i that same proceeding. As our petition for certiora noted (at page 14), as the record indicates, and a respondent is unable to deny, petitioner was afforde

---

[1] As former Solicitor General Griswold summarized the cases i 1971 the Confrontation Clause permits admission of "prior r corded testimony when the witness is dead or when he is current present and subject to cross-examination." Griswold, "The D Process Revolution and Confrontation," 119 U.Pa.L.Rev. 711, 7 (1971). In so doing, he accurately anticipated this Court's d cision in *Mancusi* v. *Stubbs*, 408 U.S. 204, 216 (1972), that a findi of unavailability of the accuser whose prior recorded testimony sought to be used is a "requirement of the confrontation claus

the opportunity only to make a *written* offer of proof. When he, in writing, inquired of the court below whether he would be permitted to examine live witnesses, he was advised, in writing, that he would not, that "no testimony will be adduced." (Record 517, 523). All the process *ever* afforded petitioner was the right to file legal memoranda, plus thirty minutes of oral argument. Neither the Due Process Clause nor the Confrontation Clause permits an attorney to be disciplined in such a manner, particularly where, as here, the case turned upon the veracity of a witness' oral testimony.[2] See *Goldberg* v. *Kelly*, 397 U.S. 254, 266-70 (1970). That is the teaching of *Willner* v. *Committee on Character & Fitness*, 373 U.S. 96 (1963), and the long line of cases under the Confrontation Clause discussed in the petition but ignored by respondent. The fact is that respondent has from the outset misconceived the meaning of confrontation; it does not understand that the Clause entitles an accused to test the recollection and veracity of his accuser in the presence of his judges "in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox* v. *United States*, 156 U.S. 237, 242-243 (1895). Accordingly, respondent success-

---

[2] An offer of proof would have added nothing to the record. Petitioner's written submissions had already made clear the nature of his defense—that he was not guilty of fraud, that his role was not as described by Brown or Young, and that Brown did not tell the truth when he testified that he had relied upon the amount of the contract rather than upon an independent appraisal of the property. The issue was who to believe—petitioner, on the one hand, or Brown, and to a lesser extent, Young and Campbell? The conflict could only be resolved on the basis of cross-examination and observation of demeanor.

fully urged the court below to act upon the record o
the prior law suit without fresh opportunity to see an
hear live witnesses. Petitioner's judges did not se
or hear either Brown, or Young or Campbell. Unde
an erroneous interpretation of the Confrontatio
Clause—more accurately, in a misguided belief that di
barment proceedings are not "adversarial"—the
accepted their prior recorded testimony and, perhap
their ex parte submissions, dispensing with live test
mony. That was error, of constitutional dimension.

2. Petitioner also contends that contrary to *In I*
Ruffalo, 390 U.S. 544 (1968), the Hawaii Suprem
Court charged him with misconduct under one sta
dard, then suspended him from practice under anothe
not previously cited. Respondent tacitly concedes th
accuracy of this contention, but argues that petitione
did have timely notice of the "transaction" involved-
that is, the alleged fraud in connection with the valu
of the construction contract. But the same could
said about *Ruffalo.* John Ruffalo knew the facts upo
which the court was focusing, but he was not apprise
from the outset of the precise legal standard by whic
his conduct would ultimately be measured. There,
here, a mid-stream switch in legal theory amounted to
denial of due process.

3. Petitioner contends, finally, that he was denie
his right to trial by a fair tribunal when the Hawa
Supreme Court condemned him publicly in reviewin
a prior civil proceeding, repeatedly received surrepti
tious ex parte communications attacking petitioner, an
then proceeded to ignore its own rules and "try" th
case itself. Respondent defends on the tenuously rel
vant ground that a judge need not disqualify himse

because of derogatory information he has become aware of in the course of another judicial proceeding. That is no answer here. Petitioner's contention that the tribunal in this case was tainted by ex parte attacks is not denied. And there is no adequate explanation why the court reached out to "try" this disciplinary proceeding, something it had never done before, rather than confine itself to its usual appellate function.

* * *

We are assured, in the last sentence of respondent's brief, that it is "unlikely" that the Hawaii Supreme Court will do any of these things to another attorney. That is little consolation to petitioner. Moreover, it is tantamount to an admission that what happened here never should have happened. Yet respondent concedes that under Hawaii law, the Supreme Court remains free to ignore its amended rules and do to another what it did to petitioner. And respondent's brief demonstrates that no-one can rely on the Attorney General properly to interpret the Confrontation Clause with respect to disciplinary proceedings.

Petitioner had no trial below. His defense was restricted, by order of the court, to written submissions and thirty minutes of oral argument. Because the proceeding was commenced, contrary to Hawaii practice, in the state Supreme Court, petitioner has had no opportunity for appellate review. Mr. Justice Brennan has recently reminded us that this Court values the right of litigants to obtain at least one level of appellate review, that this concern motivates the Court to hear argument in cases where there would otherwise be no appellate review. In "The National Court of Appeals: Another Dissent," 40 U.Chi. L.Rev. 473,

474 (1973), the Justice wrote in connection with this Court's policy of setting oral argument in cases under the Expediting Act:

> "we are regularly constrained to grant review, not so much because the question presented is especially important or because the District Court may well have erred, but rather because we are reluctant to deprive the losing litigant of any opportunity for appellate review of the trial court's decision."

In the present case, this constraint is reinforced by the circumstance that petitioner not only has had no appellate review, but no trial either. Moreover, the questions raised by his petition *are* "especially important."[3] And the Court below did err.

---

[3] Although the Attorney General now suggests that the issues are unimportant and do not warrant review by this Court, he took quite another tack when petitioner sought a federal court injunction against commencement of this original proceeding in the Supreme Court of Hawaii. In his brief in the U. S. Court of Appeals for the Ninth Circuit, dated February 5, 1973, the Attorney General contended that "even in the unlikely event that improper standards are applied by the Hawaii Supreme Court, Appellant could seek review by the Supreme Court of the United States by petition for writ of certiorari. The appropriateness of this route was discussed in *Erdmann* [v. *Stevens*, 458 F.2d 1205, 1211 (2d Cir. 1972)]:

> 'Undoubtedly because of general recognition of the advisability of permitting state courts first to act with respect to the delicate relationship between themselves and their officers, the traditional manner of obtaining adjudication of federal constitutional questions arising out of such disciplinary proceedings has been by way of the state appellate court route to the Supreme Court rather than by direct federal intervention at the initial stages.' "

Answering Brief, p. 8, *Corey* v. *Richardson*, No. 72-3033 (9th Cir. 1973).

A writ of certiorari should be granted if the Due Process and Confrontation Clauses are to have any meaning in lawyers' disciplinary proceedings.

Respectfully submitted,

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May 8, 1974